INDEX OF PAPERS

SL.NO.	PARTICULARS	PAGES
1.	Office Report and Limitation	A
2.	Listing Performa	A1 - A2
3.	Synopsis and List of dates	B - U
4.	Certified copy of the Impugned Judgment dated 23rd March, 2012 passed by the Hon'ble High Court of Gujarat in Special Civil Application No.449 of 2010	1 - 124
5.	Special Leave Petition with affidavit	125 - 169

Please see VOLUME –II
(Pages Nos. 170 & 508)

B

SYNOSPIS

The Petitioner is constrained to file the instant petition challenging the Impugned judgment and order dated March 23, 2012, passed by the Hon'ble High Court of Gujarat in SCA No. 449 of 2010 titled *Goolrokh M. Gupta, Malden Name Goolrokh A vs. Burjor Pardiwala, President & 8 Ors.* ("**Impugned Judgment**").

The humble Petitioner herein, begs to raise serious questions of law relating to consequences of civil marriages performed between man and woman of different religions in general and fundamental rights of the Petitioner a Parsi Zoroastrian to practice and profess religion of her birth, faith and choice after marriage with non Parsi under the **Special Marriage Act, 1954** in particular. It is submitted that the full Bench of the High Court of Gujarat in its split judgment **(2:1)** has, while denying relief to the Petitioner has laid down propositions which have far reaching consequences and require an authoritative pronouncement by this Hon'ble Court.

The question that arises for consideration in the instant petition is whether the Petitioner – a Parsi woman by birth and a Zoroastrian by religion – by contracting a civil marriage with a non-Parsi man under the **Special Marriage Act, 1954,** a

special statute under which neither spouse is required to renounce his / her religion, ceases to be a Parsi Zoroastrian and consequently, relinquishes her right to practice Zoroastrian religion by way of offering prayers in the Fire temple, entering the Tower of Silence and participating in religious ceremonies held therein. The Hon'ble High Court concluded that by virtue of her marriage to a non-Parsi, the Petitioner ceases to be a Parsi and accordingly, her prayers for relief on the basis of her status as a Parsi Zoroastrian does not require its consideration.

While the Impugned Judgment is passed *in personam*, against the Petitioner, a Parsi Zoroastrian woman, its effect is *in rem*, i.e. to all women, irrespective of their personal religious faith.

By way of the Impugned Judgment, the Hon'ble High Court, in the absence of any provision of law to that effect, has purported to create a legal fiction by which a woman entering into an inter-religious marriage is *deemed* to have changed her religion after marriage to that of her husband. The Hon'ble High Court proceeds on a principle, stated to be *'generally accepted throughout the world'*, that until her marriage, a woman's decision as to which religion she follows is dependent upon the religion of her father and after her marriage, it is dependant on that of her husband.

It is submitted that the aforesaid rationale is based on the ancient feudal notion of women being regarded as chattels – an expression essentially reflecting the position of dominion over women by men. There is no law in India which says that a woman must adopt her husband's name or religion upon marriage. In was pointed out by the King's Bench as far back as 1917 that "*a wife acquires by the status of marriage the domicile of her husband and is subject to the law of that domicile, but she does not acquire his religion or become subject to the laws of that religion.*" ***[Rex vs. Hammersmity Superintendent, Registrar of Marriages: Mir Anwaruddin Ex parte (1917) 1 K.B. 634,*** **referred in,** ***Rakeya Bibi vs. Anil Kumar Mukherji ILR (1948) 2 Cal 119.*** Further the 235th Report of the Law Commission of India clearly states that conversions are separate from marriage and notes that conversion is a solemn act, not necessarily requiring any rites or ceremonies – and cannot be placed on the same pedestal as marriage.

The Hon'ble High Court has failed to appreciate that in the last hundred years much water has flown under the bridge and India has witnessed a sea change in its approach to women's position in society. The rights of women are today universally accepted as an inalienable, integral and indivisible part of universal human rights. Equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth. Equal marital and family rights of men and women is a facet of

the equality enshrined in our Constitution and therefore, any and all forms of discrimination on the grounds of gender is violative of fundamental human rights and freedoms - rendering itself repugnant to the Constitution. In allowing a male Parsi, married to a non-Parsi woman to enjoy all the rights and privileges of the Parsi Zoroastrian religion whilst denying such rights to Parsi Zoroastrian women married to non-Parsi men under the Special Marriage Act, 1954, the Hon'ble High Court failed to appreciate that the Respondent Trust is arbitrarily discriminating against women.

In the recent decision, rendered by this Hon'ble Court in ***Rameshbhai Dabhai Naika vs. State of Gujarat & Ors. JT 2012 (1) Supreme Court 515***, this Hon'ble Court has in fact cautioned that it is neither proper nor desirable to interpret modern day situations based on judicial decisions which were rendered about a century and a quarter ago in a completely different social and historical milieu. This Hon'ble Court further held that "*we are not quite sure of the propriety or desirability of using those decisions in a totally different context in the post-Constitutional independent India where there is such great consciousness and so much effort is being made for the empowerment of women and when instances of the inter-caste marriage are ever on the increase.*" While dealing with a case of inter-caste marriages, this Hon'ble Court rejected the argument that upon marriage the woman takes the caste of her husband.

The Special Marriage Act, 1954 was enacted as a progressive legislation – (In accordance with the spirit of the Constitution and in stark departure from the Act of 1872 and the Amending Act of 1923) - enabling two persons belonging to different religions to enter into marriage without either having to renounce his or her religion and/or convert to the religion of the other. Originally, the 1872 Act did not apply to marriages between persons either of whom were Christian, Jewish, Hindu, Sikh, Parsi, Buddhist or Jain. The Amending Act of 1923, which contained provisions regarding solemnization of inter-religious marriages, required the parties to renounce their religion and thereafter, have their marriage registered under the said Act upon a declaration that they do not profess any of the afore-mentioned religions. The Special Marriage Act of 1954, departing from the previous position, provided for a *'special form of marriage ...irrespective the faith which either party to the marriage may profess'* (as stated in its Objects and Reasons) – thereby divorcing religion from personal laws.

Therefore, under the present law, a Parsi Zoroastrian Woman upon her marriage to a non-Parsi under the Special Marriage Act, 1954 continues to be a Parsi Zoroastrian and continues to profess the Zoroastrian religion - in the absence of the earlier requirement of having to expressly renounce her religion at the time of her marriage. The aforesaid Act, it is submitted, was amended to bring it in line with the constitutional values of secularism and an egalitarian social order that

Independent India aspired to achieve. It is submitted that the Hon'ble High Court completely disregarded the legislative intent for enacting the Special Marriage Act, 1954 and by way of judicial legislation, exceeding its jurisdiction; has sought to undo the change introduced by aforesaid new legislation by creating the deeming legal fiction. It is submitted that in the absence of any provision of law to that effect, the Hon'ble High Court has exceeded its jurisdiction and has purported to legislate.

The aforesaid presumption / the deeming fiction - of the woman on marriage acquiring the religion of her husband the Hon'ble High Court proceeds to hold - will remain good until it is established in a court of law after a fact finding inquiry is conducted, even for marriages solemnized under the Special Marriage Act, 1954, that the woman continued to follow the religion that she practiced prior to her marriage. The Impugned Judgment, thus, compels every woman, who does not intend to adopt her husband's religion after an inter-religious marriage, to file legal proceedings and obtain a declaration that she continues to practice the same religion that she did prior to such marriage. By doing so, it is submitted, the Impugned Order subjects her Article 25 rights *'to freely profess, practice and propagate religion'* to a verdict of a Court acknowledging that right. Thus, short of such a declaration from a court of law, the deemed fiction would apply, obliterating her rights under Article 25. In other words, a woman's right under Article 25, at different stages of her life, according to the Impugned Order, is

dependent on her father or her husband or a court of law. Article 25 provides that *all* persons – men and women /citizen and non-citizen alike – have the right to profess, practice and propagate their religion *freely* without any hindrance. The only condition necessary for recognition and enforcement of this right is that the person belongs to the religion. Thus once a person is initiated into a particular religion, as a matter of law, he or she has the right to practice that religion, *freely*, without any hindrance. Therefore, the aforesaid basis/rationale of the Impugned Judgment, it is submitted, is repugnant to the core fundamental values in Articles 15 and 25 of the Constitution.

It is further submitted that the Hon'ble High Court committed grave error in failing to consider that initiation into a particular religion is not always automatic or even by birth – in fact most religions mandate performance of certain ceremonies that mark the admission of the person into that particular religion. By way of the deeming fiction introduced by the Hon'ble High Court, a person not considered as belonging to a particular religion - absent the ceremony initiating her into the religion - is now thrust into the community by the mere fact of marriage to a member of such community. The High Court ought to have appreciated that relinquishment of a religion and embracing another one is a matter of personal faith of an individual, ordinarily preceded by ceremonies prescribed under the respective religions and coupled with the intention of the individual to relinquish one religion and embrace the other.

The Impugned Judgment is also vitiated by a fundamental fallacy in law, i.e. equating race, religion and caste. While using the said terms interchangeably the Impugned Judgment fails to recognize that the Petitioner is a Parsi by race and was initiated into the Zoroastrian religion by Navjote Ceremony performed by an ordained priest, and that a person's race and religion cannot change by reason of marriage, and the Petitioner could not have ceased to be a Parsi Zoroastrian upon marriage to a non-Parsi under the Special Marriage Act, 1954. : A Parsi Zoroastrian marrying under the Special Marriage Act, 1954 and not renouncing his or her religion continues to be Parsi Zoroastrian.

As per the Impugned Judgment, consequent to her marriage to a non-Parsi, the Petitioner automatically loses her identity as a natural born Parsi Zoroastrian and therefore is held to lose the right to attend and pray at the Agiyari (Fire Temple), attend and participate in funeral ceremonies at the Dungerwadi (Tower of Silence) including sitting in the room where the body of the Parsi Zoroastrian is kept (even of her own parents / siblings / friends), to perform ceremonies at that place, or have her own funeral conducted at the Tower of Silence. Curiously, such religious ostracism does not apply to Parsi Zoroastrian males married to non-Parsi females. In fact, in their context, even their children (born out of such inter-religious wedlock to a non-Parsi Zoroastrian woman) can be recognized as Parsi Zoroastrians.

The Court came to these conclusions, despite categorically admitting and/ or considering that:

(a) There was no material whatsoever to show that there was anything in the Parsi Zoroastrian religion which would show how entry of a non-Parsi to a Fire Temple or Tower of Silence for offering prayers would violate the integral parts of Zoroastrian religion;

(b) Different Parsi denominations spread across the world (including India) are applying different rules of conduct on Parsi women married to non-Parsi men. While the Agiyaris / Trusts situated in Delhi, Pardi, Kanpur, Madras, Jabalpur, Allahabad, Daman, Chikhli, Jamshedpur, Kolkata, Vadodara, London, Ontario (Canada), Florida and Chicago (USA) - do not prohibit Parsi Zoroastrian women married to non-Parsi men to enter or offer prayers at the Parsi Agiyari or participate in Parsi religious functions and ceremonies, the present Respondent Trustees are adopting a completely opposite, discriminatory and retrograde practice in Valsad;

(c) In the past, the same Respondent Trust, under the management of different trustees/office bearers,

permitted Parsi Zoroastrian women married to non-Parsi men to enter and / or offer prayers at the Agiyari in Valsad and/ or participate in Parsi religious functions and ceremonies, including attending prayers at the tower of silence.

(d) The law as to admission of Parsi Zoroastrian into fire temples etc., and as to conversion is governed **by two landmark decisions of Bombay High Court in *Sir Dinshaw Manekji Petit vs. Jamsetji Jeejeebhoy (1908) I.L.R. 33 Bom*** **and of the Privy Council in *Saklat vs. Bella (1926) 28 BomLR 161,*** in which the Hon'ble Court categorically held –

(i) That the Zoroastrian religion not only permits but enjoins the conversion of a person born in another religion and of non- Zoroastrian parents.

(ii) That although such conversion was permissible, the Zoroastrians, ever since their advent into India, 1,200 years ago, have never attempted to convert anyone into their religion.

(iii) That the **Parsi Community consists** of Parsis who are descended from the original Persian emigrants, and who are born of both

Zoroastrian parents, and who profess the Zoroastrian religion, the Iranies from Persia professing the Zoroastrian religion, who come to India, either temporarily, or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion.

(iv) That the Trustees of religious Trusts (as held in *Bella's* case) are not bound to exclude persons who may have no legal title to or in the Trust premises.

(e) In ***Jamshed Kanga & Anr. vs. Parsi Panchayat Funds and Properties & Ors. 2011(113) Bom L.R. 1047*** , the Bombay High Court, after considering the landmark decisions in *Petit vs. Jeejeebhoy* and *Saklat vs. Bella* as well as the various judicial pronouncements of this Hon'ble Court, *inter alia* held that:

(i) the administration of a religious trust is a secular activity,

(ii) trustees are to only perform secular duties and do not have any religious functions,

(iii) a right is recognized in absolute terms in every member of the Parsi community, who professes Zoroastrian religion, to be able to

M

utilize the Towers of Silence as a place for exposure of the dead and for the purposes of religious rites and ceremonies,

(iv) the trustees have not been conferred with the power to exclude,

(v) no power of excommunication exists in the Zoroastrian faith.

The Hon'ble High Court failed to consider that where property is vested upon trust for the benefit of certain persons, the trustees cannot rely on provisions or principles outside the trust deed to exclude intended beneficiaries from the benefits of such trust property. It is evident from the Impugned Judgment that the Hon'ble High Court misdirected itself in considering the rights of a religious denomination when all that was required is interpretation of the provisions of the trust deed of the Respondent.

It is submitted that the Hon'ble High Court erred in holding that the Petitioner's writ is not maintainable against the Respondent – being a private Trust. It is submitted that Indian jurisprudence has extended the principle of fairness to those who discharge public functions. Even the notion of public functions has been significantly expanded in recent times, in that, a body is held to be performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public

as having authority to do so. A private body performing a 'public function' is held to the constitutional standards regarding civil rights and equal protection of the laws that apply to the State itself. The administration of the Tower of Silence though privately carried on, was, nevertheless, in the nature of a 'public function', that the private rights of the Trust must therefore be exercised within constitutional limitations.

The Hon'ble High Court failed to appreciate that the Respondent, which admittedly provides facilities for disposal of the bodies of human beings, is performing a public function or an activity in the nature of a public function, and a writ petition filed under Article 226 of the Constitution is thus maintainable against the Respondent. A facility for disposal of the bodies of human beings, it is submitted, is a public function when the same is prescribed in the Twelfth Schedule to the Constitution, read with Article 243W, as one of the functions of Municipalities provided for in Part IXA of the Constitution.

The Hon'ble High Court ignored that Article 25(1) of the Constitution provides that *"all persons"* (not merely citizens but all persons) have *"the right to freely profess, practice and propagate (their) religion"*. "Race" or "caste" has no place in Article 25: the constitutional right (a right higher than customary or statutory right) is to freely profess and practice one's religion, viz. like one's other co-religionists.

Therefore, once the High Court admitted that the Petitioner was a born Parsi, initiated into the Zoroastrian religion through performance of the navjote ceremony by an ordained priest, then the High Court ought to have appreciated and held that she is entitled as a matter of law to practice her Zoroastrian religion.

The High Court ought to have appreciated that the constitutional right under Article 25(1) is a stand-alone right, and the provisions of Article 25(2) ("Nothing in this Article... shall prevent the State from making any law regulating any economic, financial, political or other secular activity which may be associated with religious practice or providing for social reforms etc.") does not indicate that this right is addressed only to the State. On the contrary, the opening lines of Article 25(2), ("*Nothing in this Article...*"), presuppose that the provisions of Article 25(1) are meant to be observed by all, including individuals and trusts. The word "freely" in the phrase "*the right freely to profess, practice and propagate religion*" in Article 25 lends support to this interpretation because "freely" means "without let or hindrance".

Despite this legal position, the High Court has committed a grave error by forbidding the Petitioner, a born Parsi, Zoroastrian woman, from freely practicing her Zoroastrian religion. The Impugned judgment, in addition to being wrong in law, is deeply misogynist and totally hampers women's empowerment in India.

LIST OF DATES

P

1st December 1965 — The Petitioner, an Indian citizen, was born to Parsi Zoroastrian parents, Mr. Adi J. Contractor and Ms. Dinaz A. Contractor – who are also Indian citizens, following the Parsi Zoroastrian religion since their birth.

1971 Navjote — As per the tenets of the Parsi Zoroastrian religion, the Petitioner's Navjote ceremony was performed by Dasturji Saheb.

December 6, 1990 Name change — Much prior to her marriage, on December 6, 1990, the Petitioner, of her own free will, changed her name from 'Goolrookh' to 'Neha'

February 1, 1991 Marriage — When the Petitioner was about 26 years old, she married Mr. Mahipal Gupta, a Hindu, under the provisions of the **Special Marriage Act, 1954.** Unlike the provisions of its predecessor legislation (i.e. the Special Marriage Act, 1872), the Special Marriage Act, 1954 does not require a party marrying there under to renounce and / or change his / her religion. The said marriage was consented to and blessed by the family of both the Petitioner as well as her husband.

Both before and after her marriage, the Petitioner has been a Parsi following Zoroastrian religion and she continues to be a Parsi Zoroastrian. The Petitioner has never renounced

her religion and does not desire to do so either. The Petitioner regularly goes to Agiyaris (Fire Temples) in Mumabi, where she resides.

December 31, 1993

Earlier Trust practice

Ms. Dilbar Valvi, a Parsi Zoroastrian, married to a non-Parsi lost her father and his funeral was conducted at The Tower of Silence situated at Dharampur Road, Valsad – a property under the control and management of the Respondent Trustees pursuant to a Trust Deed dated February 13, 1897. At the said time, the (then) Trustees of the Respondent Trust allowed Ms. Valvi to attend all the last rites and ceremonies of her father. The Trust Deed dated February 13, 1897 does not prohibit a Parsi Zoroastrian woman married to a non-Parsi and continuing to follow her Zoroastrian religion from attending the places of worship etc.

29 December 2008

New practice of present Trust.

However, on December 29, 2008, when Ms. Dilbar Valvi, lost her mother, the present Trustees of the Respondent trust ruthlessly stopped her from attending and performing the last ceremonies of her late mother. They did not allow Ms. Valvi to sit in the room where her mother's body was kept, did not permit her to sit even at the verandah of the Bungali, the house, where the last rites were being performed saying that she was married to a non-Parsi.

R

September 14, 2009

It is pertinent to note that the Petitioner's own parents are aged people, both around 80 years old and reside in Valsad, Gujarat where the Parsi Agiyari at Mota Parsiwad (under the control and management of the Respondent Trust) is situated. In fact, the Petitioner's father is a Trustee of the Valsad Parsi Anjuman Trust.

Vide a letter of September 14, 2009 addressed to the Respondents, the Petitioner recorded the facts of Ms. Dilbar Valvi's case, as mentioned above, and called upon them to confirm the validity of her position as a Parsi Zoroastrian married to a non-Parsi under the Special Marriage Act, 1954. In the said letter, the Petitioner pointed out to the Respondents that they had ruthlessly refused and not permitted two Parsi Zoroastrian ladies, viz. Ms. Aloo Desai and Ms. Dilbar Valvi, who are both married to non-Zoroastrians, to attend the last rites of their mother at the Dungerwadi (Tower of Silence).

The Petitioner informed the Respondent Trustees that the reason for her writing the communication was to see and ensure that at no point of time should the Petitioner be a victim of such an illegal stand due to the prejudice of a

few of the Respondent Trustees and that she will continue to follow her Zoroastrian religion and continue to visit Agiyaris and Atash Behram including the Parsi Agiyari situated in Mota Parsiwad, Valsad and shall also attend all the religious ceremonies as done in the past of her relatives and friends, such as, Navjote, Jashan, Baj, Nirangdin, Vandidad, Ferashta, Muktad etc.

September 25, 2009 — It appears that the Respondent Trustees held a meeting where they discussed the Petitioner's letter. While four of the Trustees were of the opinion that the Petitioner should be allowed to attend all Parsi Zoroastrian religious ceremonies, four observed that she should not be allowed, and one of the Trustees abstained from expressing any view.

December 1, 2009 — The Respondent No. 1, as the President of the Board of Trustees, by his letter dated December 1, 2009 *inter alia* stated that some decisions had already been taken in earlier meetings of the General Body and that therefore the Trustees were not in a position to take a decision on the Petitioner's request wherefore they deferred the question to the next general meeting.

December 26, 2009 — The Petitioner was informed of a so-called binding Resolution dated December 27, 2001 which allegedly disallowed Parsi Zoroastrian

women who were married to a non-Parsi from attending to religious ceremonies in a Parsi Agiyari / Dungerwadi etc. Curiously in fact, a reading of the said Resolution clarifies that no such decision was at all taken on the issue raised by the Petitioner in the said Resolution as alleged.

January 2010 Apprehensive that in the unfortunate event of the demise of either of her parents, the Petitioner may not be allowed to participate in their last rites at the Tower of Silence at Dhampur Road, Valsad, the Petitioner filed SCA No. 449 of 2010 before the Hon'ble High Court of Gujarat seeking *inter alia* issuance of an appropriate writ against the Respondents requiring them to allow the Petitioner and not to prevent her or any other Parsi Zoroastrian woman married to a non-Parsi under the Special Marriage Act, 1954 from entering into and / or worshipping at the Agiyari or Fire Temple situated at Mota Parsiwad, Agiyary Street, Valsad or from attending or participating at the funeral ceremonies / prayers at the Tower of Silence or having her own funeral at the Tower of Silence, Valsad. The Petitioner also sought interim relief in this behalf. A true copy of SCA No.449 of 2010 along with Annexures thereto is annexed

hereto and marked as **Annexure P1 (Collectively) [Page Nos.170 to 503]**.

March 23, 2012 — The Hon'ble High Court of Gujarat refused any relief to the Petitioner and dismissed SCA No. 449 of 2010 by way of the Impugned Judgment

25/6/12

Hence this Special Leave Petition

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[UNDER Articles of the Constitution of India]

Mrs. Goolrookh M. Gupta

(Maiden name Goolrookh A. Contractor) Petitioner
Gulmarg Building,

1st Floor, Nepean Sea Road,

Mumbai

Versus

1. Mr. Burjor Pardiwala, President

Trustees of the Valsad
Parsi Anjuman Trust, At Bejan Baug
Bunder Road, Valsad 396001

2. Mr. Sam Rusi Chothia, Secretary The
Trustees of the Valsad
Parsi Anjuman Trust, At Bejan Baug
Bunder Road, Valsad 396001

3. Mr. Adi J. Contractor, The Trustees

of the Valsad Parsi Anjuman Trust,

At Bejan Baug Bunder Road, Valsad
396001

4. Mr. Bomi Erachshaw Mahernosh, The
Trustees of the Valsad
Parsi Anjuman Trust, At Bejan Baug
Bunder Road, Valsad 396001

5. Mr. Jahabux Jehangirji Mahudawala, The Trustees of the Valsad Parsi Anjuman Trust,

   At Bejan Baug Bunder Road, Valsad 396001

6. Mr. Marzban F. Dhanbhoora, The Trustees of the Valsad Parsi Anjuman Trust, At Bejan Baug Bunder Road, Valsad 396001

7. Mr. Marzban R. Marfatia, The Trustees of the Valsad Parsi Anjuman Trust, At Bejan Baug Bunder Road, Valsad 396001

8. Mr. Aspi Sanjaja Vakil, Trustees of the Valsad Parsi Anjuman Trust,At Bejan Baug Bunder Road, Valsad 396001

9 Mr. Noshir Zaroliwala, The Trustees of the Valsad Parsi Anjuman Trust At Bejan Baug Bunder Road, Valsad 396001

Respondents

Being SPECIAL CIVIL APPLICATION NO. 449 OF 2010

Appearance on Record.

MR. ADIL R. MIRZA as Advocate for the Petitioner[s] No.1

Notice Served for the Respondent [s] No. 1-2,6,8-9

Mr. ASPI M KAPADIA as Advocate for the Respondent[s] No. 1-9

Ms. Archana R. Acharya as Advocate for the Respondent[s] No.2

Rule Served for the Respondent[s] No. 3-5

COURT ORDER :

CORAM: HONOURABLE MR. JUSTICE JAYANT PATEL

HONOURABLE MR. JUSTICE AKIL KURESHI

HONOURABLE MR. JUSTICE R.M. CHHAYA

Date of Decision 23.3.2012

[COPY OF JT. ATTACHED HEREWITH]

N THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 449 of 2010

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

HONOURABLE MR.JUSTICE AKIL KURESHI

HONOURABLE MR.JUSTICE R.M.CHHAYA

---

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

GOOLROKH M GUPTA MAIDEN NAME GOOLROKH A -

Petitioner(s)

Versus

BURJOR PARDIWALA PRESIDENT & 8 - Respondent(s)

MR PERCY KAVINA WITH MR ADIL R MIRZA

for Petitioner(s): 1,
NOTICE SERVED for Respondent(s) : 1 - 2, 6,8 - 9,
MR ASPI M KAPADIA for Respondent(s) : 1,6 - 9,
MR SB VAKIL WITH MS ARCHANA R ACHARYA for Respondent(s) : 2,
RULE SERVED for Respondent(s) : 3 - 5,

CORAM : HONOURABLE MR.JUSTICE JAYANT P
and
HONOURABLE MR.JUSTICE AKIL KUR
and
HONOURABLE MR.JUSTICE R.M.CHHA

Date : 23/03/2012
CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE JAYANT PATEL)

(FOR HIMSELF AND FOR R.M. CHHAYA, J.)

1. The Division Bench of this Court (Coram : S.J.Mukopadhaya, C.J. and A.S. Dave, J.) framed the following issues –

1. Whether the petitioner - a born Parsi woman, by virtue of contracting a civil marriage with a non-Parsi man under the Special Marriage Act, cease to be a Parsi?

2. If the first issue is answered in negative, then the question will be as to whether the respondents are justified in refusing the petitioner her rights of being a natural Parsi?

3. Whether the High Court under Article 226 of the Constitution of India can issue a writ of mandamus to the respondents to grant reliefs as sought for in the present case?

2. It was also observed by the Division Bench of this Court that it will be open to the parties to raise any other issues. Under the circumstances, the matter before the present Bench of this Court.

FACTUAL BACKGROUND:

3. Before we consider the controversy or express view on the aforesaid issues, factual background would be relevant and deserves to be considered. The petitioner is a born Parsi Zoroastrian woman/lady whose parents are Mr. Adi J Contractor and Mrs. Dinaz A. Contractor. Both are Parsi Zoroastrians following Zoroastrian religion. As per the petitioner, Navjote ceremony of the petitioner was performed by Dasturji Saheb in the year 1971 as per the tenets of Zoroastrian religion.

4. On 01.02.1991, as per the petitioner, she got married to Mahipal Gupta, a born Hindu male as per the provisions of Special Marriage Act. The petitioner contends that even after the marriage, she has continued to follow Zoroastrian religion and therefore, she has the right to enjoy all privileges under the Parsi Religion including right to offer prayers at Agiari (Parsi temple comprising of Holy fire) and a tower of silence for funeral. She contends that like the petitioner, one Mrs. Dilbar Valvi, Parsi woman since had got married to a Hindu man,

Mr.Prakash Sukheswala, when Dilbar's father had passed away and the funeral was performed at tower of silence at Valsad, she was not allowed by the Trustees of Valsad Parsi Anjuman to attend all ceremonies in the tower of silence. Similarly, when the mother of Dilbar died, Dilbar was not allowed to even sit in the room where the dead body of her mother was kept. The petitioner contends that same treatment would be given to her unless there is any appropriate direction.

5. As per the petitioner, Parsi Agiari at Mota Parsiwad, Agiari Street, Valsad is the place at which all Parsi Zoroastrians are entitled to free access for the purpose of worship and ceremonies. Parsi tower of silence situated at Dhampur Road, Near railway crossing, over bridge, Valsad is also a place to which all Parsi Zoroastrians are entitled to free access for the purpose of attending funeral ceremonies of other Parsi Zoroastrians and all Parsi Zoroastrians have a right for having their funeral at the tower of silence. The respondent nos. 1 to 9 are controlling and in charge of the said Parsi Agiari being trustees of Valsad Parsi Anjuman Trust.

6. It is the further case of the petitioner that if a male Parsi Zoroastrian marries to a non-Parsi or a non-Zoroastrian family,

he continues to enjoy all rights as available to a born Parsi whereas if a female Parsi Zoroastrian marries to a non-Parsi or a non-Zoroastrian male, such rights are not recognized or permitted by the respondents and therefore, she contends that there is a discriminatory treatment being given by respondents no.1 to 9 as compared to Parsi males which violates Articles 14 and 25 of the Constitution of India. As per the petitioner, the approach on the part of respondents of not allowing a Parsi Zoroastrian female to enjoy all rights after her marriage with a non-Parsi male is an orthodox view by completely ignoring the law of the land. It is further case of the petitioner that there is nothing in the Zoroastrian religion or scriptures or any textbooks which denies any Parsi Zoroastrian woman married to non-Parsi non-Zoroastrian man prohibiting the rights as born Parsi woman even after marriage. As per the petitioner, she has entered into various correspondences with High Priest of Parsi Zoroastrian including the person in charge of Parsi Agiari at Valsad but her right has been denied or not recognized by respondents no.1 to 9. Therefore, the petitioner apprehends that in the event of demise of any of the petitioner's old parents, she will be denied her rights as born Parsi for offering prayers at Agiari and she would not be allowed to sit in the room where the dead body would be kept

and all other rights as available to a born Parsi family and therefore, she has approached to this Court. It is contended by the petitioner that she has a fundamental right to have free access for the purpose of worship and other ceremonies as available to all Parsi Zoroastrians and since such right is denied, the present petition. The prayers made by the petitioner in the petition are to issue appropriate directions to the trustees of Valsad Parsi Anjuman Trust to allow the petitioner and not to prevent the petitioner or any other Parsi Zoroastrian woman married to a non-Parsi Zoroastrian under the Special Marriage Act from entering and/or worshiping at the Agiari of a Fire Temple situated at Mota Parsiwad, Agiari Street, Valsad or from attending or participating at the funeral ceremonies/prayers at the tower of silence or having her own funeral at the tower of silence at Valsad.

7. The petition has been resisted by the concerned respondent Trustees of the Valsad Parsi Anjuman Trust contending inter alia that the petition involves serious and controversial questions of religious rights of the parties and highly disputed questions of facts. It is contended that the petition against the respondent Trustees is not maintainable since it is neither a State nor an authority within the meaning of Articles 12 and

226 of the Constitution of India nor a Tribunal or statutory authority or any instrumentality of the State. It is contended that the respondents do not perform any statutory function or have no obligation to the petitioner. It has also been stated that the respondent Trust does not receive any grant or aid from the State nor their functions can be supervised by the State or any of its authority.

8. It has been contended that even a private interest litigation involving questions of public interest would assume the character of public interest litigation and the petition being a public interest litigation ought to have been filed as a representative petition and analogous to a proceeding under Order I Rule 8 of the CPC. It is contended that the petitioner has the alternative remedy to seek direction of the Charity Commissioner under section 41A of the Bombay Public Trust Act or filing a suit under section 9 of the CPC. The respondents further contend that there are suppression of material fact on the aspects of details given by the petitioner for various Parsi Agiaris and Dokhmas.

9. The respondents further contend that the Zoroastrian religion considers marriage as a sacred religious institution that

contemplates and recognizes only that union as marriage in which both spouses are born Parsi Zoroastrian and profess Mazdayasni (Zorathosti) religion. It is submitted that the Zoroastrian and Parsi traditions do not recognize any other kind of union. As per the respondents, marriage in Parsi religion is not just a contract for the physical and emotional union of the couple but a sacrament or precursor to the salvation of the soul and in Parsi religion, there is no marriage between Parsi Zoroastrian and an alien. It is submitted that when a Zoroastrian woman marries to a non-Zoroastrian spouse, she loses her Zoroastrian religion title and the religious identity and automatically leaves the religion of her father and her family irrevocably irrespective of whether she is admitted to her husband's religion or not. As per the respondents, it makes no difference whether the Act requires a person marrying thereunder to declare that he/she was not following his/her religion or whether the petitioner did any further act in addition to her marriage to change her religion. As per the respondents when a Parsi Zoroastrian male marries to a non-Parsi Zoroastrian woman, he continues to hold his pre-marriage religion title whereas when a Parsi Zoroastrian female marries to a non-Parsi, she ceases to hold her pre-marriage religious title and acquires the religious title of her

husband. In all religious ceremony, the religious title of Parsi Zoroastrian, whether male or female is required to be recited and after marriage, the name of the Parsi Zoroastrian woman is recited with the religious title of her husband, whereas the name of the Parsi Zoroastrian male would be continued to be recited with the religious title prior to the marriage. It is also submitted that the Parsi male Zoroastrian married to non-Parsi Zoroastrian woman and Parsi female Zoroastrians married to non-Parsi Zoroastrian husband also constitute the different classes having intelligible differentia which have reasonable nexus with the object of non-exclusion of males and exclusion of woman from the religious rights claimed by the petitioner. The distinction between the males and female in the matter has been historically recognised for centuries and there is no violation of the rights of the petitioner or other Parsi Zoroastrian women under Articles 14 and 25 of the Constitution of India.

10.It has been submitted by the respondents that if the marriage contracted between the persons of different faith may be considered as legal by secular State, recognition thereof cannot be forced upon the Parsi/Irani Zoroastrian community, members whereof in all religious matters are governed by their

religion, their percepts, dicta and established tradition cannot and does not deal with the rights of the Parsi Zoroastrian female marrying a non-Zoroastrian in their respective religion. It has been submitted that there are mixed issues of facts or mixed questions of law and facts pertaining to religious matters and therefore, the present petition is not the proper remedy.

11. On the aspect of the name of the petitioner, it was contended by the respondents that the maiden name of the petitioner was Goolrokh which has been changed to Neha after marriage to Mahipal Gupta, a non-Parsi and therefore, just to give a boost to her claim to be a Parsi Zoroastrian, she has stated her maiden name Goolrokh.

12. The aforesaid has been dealt with by the petitioner in her affidavit dated 23.06.2010 wherein she has admitted that it was erroneously mentioned that she had changed her name after her marriage. It has been stated by the petitioner that she had changed her name from Goolrookh to Neha before her marriage was solemnized with her husband.

13. This part has further been responded by the respondents in the affidavit dated August 20, 2011 contending that marriage under the Special Marriage Act can be registered even if solemnized under section 12 or in any form which may include marriage under any religion other than Zoroastrian and section 15 of the Special Marriage Act provides for registration of all such type of marriage. As per the respondents, the name from Goolrokh to Neha was changed after marriage with Mahipal Gupta and it is alleged that as per the information of the respondents, the petitioner got married to Mahipal Gupta at Radio Club according to Hindu rites and the marriage ceremony was videographed and therefore, the petitioner was called upon to produce the certificate for registration of the marriage under the Special Marriage Act and also to disclose the form of the said marriage. No affidavit has been filed by the petitioner meeting with the said aspect but the copy of the certificate was tendered to the Court for registration of marriage under section 12. No affidavit has been filed denying the performance of marriage at Radio Club as per Hindu rites by the petitioner.

14. We may also state that various affidavits have been filed by

both the sides of various persons who are stated to have knowledge of Parsi Zoroastrian religion. As per the petitioner's one view expressed is for supporting the petitioner that there is no prohibition as per the tenets of the religion to Parsi female marrying to non-Parsi male and entry to certain Agiaris and tower of silence are permitted to such female whereas the respondents have also produced material showing that as per the Parsi Zoroastrian religion, if the Parsi Zoroastrian female marries with non-Parsi Zoroastrian male, she would loose her identity and she would not be entitled to entry in Agiyari or Tower of Silence as not being permitted to any non-Parsi. The material for supporting the views are produced by the respondents.

15. We may also state that about 93 persons had moved an application for being joined as party for supporting the stand of the respondents no.1 to 9 but the Division Bench of this Court vide order dated 25.03.2010 had observed that it is not necessary to hear all persons belonging to such religion but the learned counsel may assist the Court as amicus curiae.

16. The petition initially had come up for hearing before the

learned Single Judge (K.S. Jhaveri, J.) but in view of the pleadings on behalf of the respondents that the petition being a public interest litigation ought to have been filed in a representative capacity and the business of PIL is allotted to the 1st Court, it directed it to be placed before the appropriate Court after obtaining appropriate orders of the Hon'ble the Chief Justice on administrative side and thereafter, the petition was treated as PIL and was listed before the Bench taking up PIL and subsequently as observed earlier, the Division Bench observed for matter to be heard by the larger Bench. Hence, before us.

17. We have heard Mr.Percy Kavina, senior counsel with Mr. Adil Mirza for the petitioner and Mr. S.B. Vakil, Senior Counsel with Ms. Archana Acharya and Aspi Kapadia for the respondents. We have also heard Mr. V.K. Shah as amicus curiae.

ISSUE NO.1

18. Special Marriage Act, 1954 (hereinafter referred to as "the Act") provides for special form of marriage under certain cases for registration of such marriage and for divorce. Section

4 provides that notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriage, a marriage between any two persons may be solemnized under this Act, if the conditions are fulfilled. Such conditions do not speak for requirement of male and female professing the same religion. The condition that not within the prohibited degree of relationship, the custom of any type of community or group or family as may be notified by the Government has a role to play to which we are not concerned in the present petition. The procedural aspect is not much relevant for the present petition except section 11 which refers to the declaration in the form specified in the third schedule of the Act by the bride and the bridegroom which also does not speak for professing of a particular religion by a bride or bridegroom. Section 12 provides that the marriage may be solemnized in any form which the parties may choose to adopt but it shall not be complete and binding to the parties unless the declaration is made before the Marriage Officer as required in proviso to sub-section (2) of section 12. Section 13 provides for issuance of certificate after the marriage has been solemnized. Section 15 provides for registration of he marriage celebrated in other forms provided the conditions are complied with. Chapter IV

which is relevant for the purpose of the present petition provides for the consequence of the marriage under this Act comprising of section 19 to 21A of the Act which reads as under -

19. Effect of marriage on member of undivided family. -

The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jain religion shall be deemed to effect his severance from such family.

20. Rights and disabilities not affected by Act. -

Subject to the provisions of section 19, any person whose marriage is solemnized under this Act, shall have the same rights and shall be subject to the same disabilities in regard to the right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850 (XXI of 1850) applies.

21. Succession to property of parties married under Act. -

Not-withstanding any restrictions contained in the Indian Succession Act, 1925 (XXXIX of 1925), with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this section that Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted therefrom.

21-A. Special provision in certain cases .-

Where the marriage is solemnized under this Act of any person who professes the Hindu, Buddhist, Sikh or Jain religion with a person who professes the Hindu, Buddhish, Sikh or Jain religion. Secs. 19 and 21 shall not apply and so much of Sec. 20 as creates a disability shall also not apply.

Section 19 of the Act provides for severance from the family, if a person marries under this Act professing Hindu, Buddhist, Sikh or Jain religion. Section 20 of the Act provides that subject to section 19, any person who marries under this Act shall have the same rights and shall be subject to same disabilities to whom the whom the Caste Disabilities Removal Act, 1850 applies.

But the pertinent aspect is that such rights and disabilities by virtue of section 20 is restricted to the rights of succession to any property only since the language used by the Parliament is "in regard to the right of succession to any property". In the present petition, there is no question of consideration of any right to succession to the property, but the question to be considered in the present petition is for preservation of the rights or continuation of the rights for religion.

Section 21 expressly provides that the succession of property of any person whose marriage is solemnized under the Act shall be regulated by the Indian Succession Act. Again, the relevant aspect to be considered is that as per the said section, for the purpose of Special Marriage Act, it shall have the effect

as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted therefrom. In other words, even for Parsi male who is married under the Special Marriage Act, specific provision made in Chapter III of Part V for his property dying intestate shall not apply but it shall be governed by the other provisions of the Indian Succession Act for the succession of the properties. Section 21A inserted by the Parliament in the statute book in the year 1976 further provides that where the marriage is solemnized under the Act of any persons who professes Hindu, Buddhist, Sikh or Jain religion with a person who professes Hindu, Buddhist, Sikh or Jain religion, sections 19 and 21 of the Act shall not apply and section 20 creating the disability shall also not apply but it does not provide for such contingency or the consequence for any person whose marriage is solemnized under the Special Marriage Act professing any religion other than Hindu, Buddhist, Sikh or Jain religion. To say in other words, if one of the party to the marriage is professing the religion other than Hindu, Buddhist, Sikh or Jain religion, sections 19 and 21 as well as section 20 shall not apply. To make it further elaborative, as in the present case, if one of the party to the marriage is professing a religion other than Hindu, Buddhist, Sikh or Jain religion, sections 19, 20 and 21 will apply. As observed earlier, section

19 provides for severance from the family but it is restricted to the person professing Hindu, Buddhist, Sikh or Jain religion. It does not speak for the person professing religion other than Hindu, Buddhist, Sikh or Jain religion. Further, as observed earlier, the rights and the disabilities are protected by virtue of section 20 only to the extent of the rights of succession of the property and no other rights. It is true that the Caste Disabilities Removal Act, 1950 is applicable to all citizen irrespective of their religion, but the rights so protected by virtue of section 20 of the Special Marriage Act are for succession to any property and not for any other rights as may be available under any law or usage in force.

19. If the facts of the case are considered, it is undisputed position that the petitioner has married with Mahipal Gupta under the Special marriage Act. It is true that there is dispute about the form of marriage between the parties inasmuch as the petitioner contend that the marriage has taken place in form omitted in Special Marriage Act only since the certificate of registration has been issued under section 13 and not under section 15 whereas the respondents contend that the marriage as per Hindu rits has been performed and the registration of such form of marriage is also permissible under the Special

Marriage Act. Be as it may but the consequence provided under Chapter IV of the Act applies to all marriages under the Act whether certificate is issued under section 13 or under 15 of the Act. It is also undisputed position that the petitioner is a born Parsi Zoroastrian female being one of the party to the marriage professing religion other than Hindu, Buddhist, Sikh or Jain religion and it is also undisputed position that her husband Mahipal Gupta is a person professing Hindu religion. The consequence as per the above referred statutory position in a case where the marriage is under the present Act would be of deemed severance from the family of a person who professes Hindu religion and the rights if any of the petitioner shall stand protected by virtue of section 20 since she is professing the religion other than Hindu, Buddhist, Sikh or Jain but such right shall be of succession to any property only. In any case, the right to profess the religion is not expressly saved or identity as per religion is not protected by virtue of section 20. We may not express finally on the aspect of succession of the properties, but suffice it to say that even if one of the party to the marriage is dying Parsi intestate, the provisions of Indian Succession Act excluding Chapter III of Part V (Special Rules for Parsi Intestates) shall be applicable.

20. The aforesaid observations and discussions lead to the situation that if the restricted meaning of consequence of marriage is given for the rights in the properties, it results into severance in the property of the Hindu family of a person professing religion of Hindu, Buddhist, Sikh or Jain. Further, if section 20 is interpreted broadly keeping in view the rights of the parties to the marriage under any other law or usage for the time being in force, then what is expressly protected and saved by the Parliament as per section 20 is the rights and disabilities in regard to the rights of succession to any property and not for any other rights which may include the rights to be identified as belonging to a particular religion or rights to profess religion.

21. The contention was raised that if a marriage is registered under the Act and the certificate is issued under section 13, there is no declaration for renouncing of the religion of either of the party to the marriage and therefore, the status as per the religion would continue.

22. The contention can be examined from two angles. One is that Parliament by express provisions has not provided that the status as per the religion or the rights consequent thereto shall continue even after the marriage and therefore, it can be said

that the status of the person as per the birth belonging to a particular religion shall get and the rights consequent thereto are not protected by express provisions of the statute. When Chapter IV provides for consequence of marriage under this Act, Parliament has found it proper to restrict and regulate and also to protect the rights only to the extent of right of succession in the property, and the other consequences after marriage as per the religion may follow. The another angle to look the matter is that if there is no declaration for renunciation of the marriage, whether the status as per the religion after marriage would continue or not. In any case, both the aforesaid angle would require further examination of the normal consequence which may arise on account of a valid marriage between a male and a female.

23. In Halsbury's Law of England, marriage is described as Holy matrimony the estate into which the man and a woman enter when they consent and contract to cohabit with each other and each other only. The solemnization of matrimony in church is on their part the attestation in the presence of God and of the church of their consent and contract so to do and on the Church's part its blessings on their union. It has been said that

the only kind of marriage which English law recognizes is one which is essentially the voluntary union for life of one man with one woman to the exclusion of all others.

24.It is by now well settled that Hindu Marriage is not a mere contract. It is Sanskara/Samaskara or sacrament. It is the most important of the Sanskara/Samaskaras. The effect of a Hindu marriage is to bring about an indissoluble union of the husband and wife which lasts even after the death of the either party. According to the sastras, the marriage was indissoluble. But the Hindu marriage Act (by the law made by the parliament) changed this aspect and provided for dissolution of marriage to remove the injustice presenting from such old state of law in certain circumstances. But still however, the principles of marriage as a sacrament is maintained for solemnization of the marriage and the requirement is that both the parties should be Hindu.

25.Under the Parsi Marriage and Divorce Act, 1936, the word "husband" is defined as Parsi Husband and the word "wife" is defined as Parsi wife and word Parsi is defined as Parsi Zoroastrian. The Act provides for the marriage between Parsis

and the another requirement for validity of the marriage together with the other is that such marriage is solemnized according to the Parsi form and the ceremony with "Aashirvad" by priest in presence of two Parsi witnesses other than that of the Priest. Since the language is "solemnization" it could be termed that the marriage amongst the Parsis would be at par with the sacrament. Amongst Muslims, they have from the beginning regarded the marriage as a contract and not as sacrament.

26.In English common law, marriage implied the merger of personality of the husband and wife. In reality, it is meant that the wife's personality is merged into that of the husband. In view of this doctrine, a man could not grant or give anything to his wife because she was "his death self" and if there were any contracts between the two before the marriage, they stood dissolved on the marriage. The freehold property of the wife vested in the husband and during the contract, he had the management of her property and take all profits derived therefrom. Her personal property entirely passed to her husband and he took it absolutely. Several things in her possession could also be taken over by the husband. Thus, the merger of the personality of the husband and wife meant that whatever property wife had at the time of marriage and

whatever she acquired later on belonged to her husband. This situation was remedied by the Married Women Properties Act, 1870 (as amended in 1977) and English married woman acquired the right to hold and acquire property. This English law doctrine was never a part of Hindu law or Muslim law. Although under Hindu law, there is a doctrine of merger of personality, the wife being ardhangini of her husband and completed him, it may not know more than unity in a spiritual sense. No part of her property belong to husband. In fact, most of the streedhan she got was acquired by her at the time of her marriage. All gifts given to her at the time of marriage belong to her. Even whatever they acquired during marriage belong to her. Though in distress the husband could use but he had to restore it later on. Muslim law do not subscribe to the notion of unity of personality of husband and wife. The wife's personality and individuality are not lost on her marriage. She continues to hold whatever property she had at the time of marriage and she can acquire property during the marriage. In India, neither Parsis nor Jews subscribe to the notion of merger of personality in the sense as an English law. But all such things are relatable to the right of the husband over the properties of the wife in her individual capacity and they may not be mixed up with her personality known by the religion. In

all religion, be it Christian, be it Parsi, be it Jews, the religious identity of a woman unless specifically law is made by the Parliament or the legislature, as the case may be, as per the religions, shall merge into as that of the husband. Such rights would be the rights other than those as may be available to a women given by the nature and the rights as otherwise specifically protected by express provisions of statute. It is hardly required to be stated that such principle is generally accepted throughout the world and therefore, until the marriage, after the name of the woman, the name of the father is being mentioned and after marriage, name of husband is being mentioned for the purpose of further describing her identity. It does not mean that after marriage, the woman or a female will have no right in her individual capacity which are otherwise guaranteed by nature or identified and protected by statute or the right of a woman to live in dignified manner in the society, but for the purpose of the present petition, we are required to examine the rights as that of the woman in the context of family which originates from marriage of a husband and wife or in other words, such family in contradistinction to the society at large.

27.Even if the family is considered in its wider meaning

originating from the husband and wife, it may extend to their children, may be son or daughter, until they are married. After the marriage of, the son or the daughter, as the case may be with any female or male respectively, for the purpose of society would be forming their independent family originating from marriage of the said couple, as the case may be. There is one additional reason why the family should be identified as separate in contradistinction to the society at large because there has to be specific certainty for identification as per religion in normal circumstances for the son or the daughter of the said couple who is born out of the said wedlock. If after his following a particular religion and as observed earlier, if a man is married with a woman following another religion, in normal circumstances, it should be deemed that woman has acquired the religion of her husband after marriage. It is only then the children born out of the wedlock will also be identified in the society following a religion which was being followed by their father prior to the marriage. Test the situation from different angle; if a man born of 'A' religion marries to a female of 'B' religion, and if for the sake of examination it is considered that husband and wife both continue to follow their original religion, as was at the birth, then large number of ambiguity may prevail about the religion on their children. Such in our

view would not be in larger interest of the society for the proper observance of the customs, traditions etc. and therefore we find it proper to observe that in normal circumstances, when the marriage takes place between a male and a female belonging to different religion, it should be presumed and considered that the woman after marriage has merged into the religion of her husband and such will be the identity of their family originating from their marriage in comparison to the society at large and such identity would stand extended to their children too. Same situation would remain in normal circumstances even for the man and woman who have married under Special Marriage Act.

28.However, the aforesaid as observed earlier would apply in normal circumstances unless it is established in any court of law after undertaking fact finding inquiry that even after marriage, the woman has continued with her own religion which existed prior to the marriage, but such conclusion can be recorded only when it is established by cogent and satisfactory evidence before the competent civil court after undertaking a full-fledged fact finding inquiry. But in absence thereof, it is to be deemed that the wife has acquired the religion of husband after marriage.

29.At this juncture, we may refer to the decision of the Apex Court in the case of Valsama Paul Vs. Cochin University reported in 1996(3)SCC 645 wherein the Apex Court had an occasion to consider the consequence of a inter religion marriage while considering the aspects of caste or religion of the wife. The Apex Court observed at paras 30 and 31, relevant of which reads as under:

> *"30. It would thus be seen that the institution of marriage is one of the sound social institutions to bring harmony and integration is social fabric. The Shastric law among Hindus has undergone sea change, in the rigidity of Shastric prescriptions. In relation to intestate succession of property, marriage, adoption and maintenance among Hindus, they are brought under statutory operation appropriately underpinning the rigid shastric prohibitions, restrictions to operate in harmony with Universal Declaration of Human Rights and constitutional rights. The right to divorce which is unknown to Hindu law is made feasible and an irretrievable breakdown of the marriage is made a ground so as to enable the couple to seek divorce by mutual consent. The Hindu Marriage Act, 1956 and Special Marriage Act, 1954 ....."*

> *"....The form of marriages is relegated to backdoor as unessential. These are matters of belief and practice and not core content. Tying Tali is a must and without it marriage is not complete in South India among all Hindus and in some parts among Harijan Christians, while exchange of rings would do in North India. Ritualistic celebration of marriage would be considered by some as valid, while most people in other sections think that factum of marriage is enough. When in Tamil Nadu such marriage is statutorily, valid would it become invalid in other parts of the country? The answer would, obviously and emphatically be, "NO". Inter-caste marriages and adoption are two important social institutions through which secularism would find*

its fruitful and solid base for an egalitarian social order under the Constitution. Therefore, due recognition should be accorded for social mobility and integration and accordingly its recognition must be upheld as valid law."

"31.It is well settled law from Mussumat Bhoobun Moyee Debia v. Ramkishore Achari Chowdhary (1865) 10 MIA 279 that judiciary recognized a century and half ago that a husband and wife are one under Hindu law, and so long as the wife survives, she is half of the husband. She is 'Sapinda' of her husband as held in Lallu Bhoy v. Cassibai (1979-80) 7 IA 212. It would, therefore, be clear that be it either under the Canon law or the Hindu law, on marriage wife becomes an integral part of husband's marital home entitled to equal status of husband as a member of the family. Therefore, the lady, on marriage, becomes a member of the family and thereby she becomes a member of the caste to which she moved. The caste rigidity breaks down and would stand no impediment to her becoming a member of the family to which the husband belongs and she gets herself transplanted."
(Emphasis supplied)

Thereafter, on the aspects of benefit of reservation after marriage, it was observed by the Apex Court at paragraph 35 as under -

"Further question is : Whether recognition by the community, as is envisaged by law and expressly recognised by this Court in Mohan Rao's case would give the benefit of reservation? In that case,, parents of Mohan Rao originally belonged to a Scheduled Caste in A.P. Mohan Rao became a Christian but reconverted into Hinduism and claimed the status as a Scheduled Caste. The Constitution Bench had held that by reconversion, he could not become a Hindu but recognition by the community is a pre-condition. In that case, it was found that caste/community had recognised him after reconversion as a member of the Scheduled Caste, In Kailash Sonkar's case (supra), this Court, in the context of election law, considered the question of reconversion into Hindu fold. On conversion to a Christianity or any other religion, the convertee would

lose the said caste. Where a person belonging to the Scheduled Caste is converted to Christianity or Islam, the same involves loss of the caste unless the religion to which he is converted is liberal enough to permit the convertee to retain his caste or the family law by which he was originally governed. Where the new religion does not at all accept or believe in the caste system, the loss of the caste would be final and complete. In South India, if a person converts from Hindu religion to other religion, the original caste, without violating the tenants of the new order to which he has gone, as a matter of common practice continues to exist from times immemorial. If a person abjures his old religion and converts to a new one, there is no loss of caste. However, where the convertee exhibits by his actions and behaviour his clear intention of abjuring the new religion, on his own volition without any persuasion and is not motivated by any benefits or gain; the community of the old order to which the convertee originally belonged, is gracious enough to admit him to the original caste either expressly or by necessary intendment; and rules of the new order permit the convertee to join the new caste, on reconversion his original caste revives and he becomes a member of that caste. However, this Court had held that "in our opinion the main test should be a genuine intention of the reconvert to abjure his new religion and completely dissociate himself from it. We must hasten to add here that this does not mean that the reconversion should be only a ruse or a pretest or a cover to guin mundane worldly benefits so that the reconversion becomes merely a show for achieving a particular purpose whereas the real intention may be shrouded in mystery. The reconvert must exhibit a clear and genuine intention to go back to his old fold and adopt the customs and practices of the said fold without any protest from members of his erstwhile caste." In that case it was held from his conduct, the respondent established that she by her conduct became a member of the community entitled to contest the elections as a Scheduled Caste. In Mohan Rao's case (supra), this court found as a fact that after conversion he was Accepted as a member of the Dalits by the community. Similar are the facts in Hero case (supra). In C.M. Arumugam v. S. Rajagopal & Ors., [1976] 1 SCC 863. this Court did not accept

reconversion, though Rajagopal proclaimed by conduct of his becoming a member of Scheduled Caste and his relations treated him as a member of Dalits. In Hero case also the respondent was recognised as a member of the Scheduled Tribe. Further in election law the compulsion of political party nominating a candidate and voters' verdict may be looked into. In Soosai v.Union of India, AIR (1986) SC 733, Bhagwati, C.J. speaking for a three Judge Bench held that non-recognition of Scheduled Caste Christians as Dalits was not violative of Article 14 as by reason of conversion they were not similarly handicapped as Dalits. In Madhuri's case and Laveti Giri's case, this Court directed procedure for issuance of social status certificates. As a part of it, the officer concerned should also verify, as a fact, whether a convert has totally abjured his old faith and adopted, as a fact, the new faith; whether he suffered all the handicaps as a Dalit or tribe; whether conversion is only a ruse to gain constitutional benefits under Article 15(4) or 16(4); and whether the community has in fact recognised his conversion and treated him as a member of the community and then issue such a certificate."

30.It is a matter of fact that no fact finding inquiry has been undertaken on the aspect of the status of the petitioner herein to be continued as Parsi Zoroastrian after marriage nor this Court in a petition under Article 226 of the Constitution can conveniently undertake such exercise. Therefore, in absence of any fact finding inquiry undertaken about the status of the petitioner on the aspects of her non-acceptance of the Hindu society as Hindu and the acceptance and continuation of her status as Parsi Zoroastrian, it may not be possible for this Court to accept the petitioner as continued to be Parsi

Zoroastrian after marriage with a non-Parsi man, may be even under Special Marriage Act.

31.In view of the aforesaid observations and discussions, the issue no.1 can be concluded as under:

32.A born Parsi woman by contracting civil marriage with a non-Parsi under the Special Marriage Act would cease to be Parsi and she would be deemed and presumed to have acquired the religious status of her husband unless declaration is made by the competent court for continuation of her status of Parsi Zoroastrian after her marriage. After the the declaration is made by the competent court after undertaking full fledge fact finding inquiry on the aspects as to whether after marriage, she has totally abjured Hinduism, the community to which her husband belongs and she has continued to remain as Parsi Zoroastrian and whether she has adopted/continued the religion of Parsi Zoroastrian to gain any benefit or whether the community, viz., Parsi Zoroastrian, has treated her as a member of Parsi Zoroastrian for all purposes or not.

ISSUE NOS.2-3

33. As such, we have answered issue no.1 in affirmative in absence of any declaration of any competent civil about the religious status of the petitioner as Parsi Zoroastrian, after fact finding inquiry. Therefore, one might say that issue no.2 may not be required to be further examined. But as the whole matter is referred to us, we find that we should not leave the matter at that stage but should also examine as to whether the respondents could be said as justified in refusing the petitioner her right of being a natural Parsi Zoroastrian or not.

34. The resistance is made by the respondents by denying or refusing the petitioner of her rights as Parsi Zoroastrian on the ground that she has married with a non-Parsi man. Therefore, two aspects may be required to be further examined; one would be if the petitioner continues to enjoy the status as natural Parsi Zoroastrian, would the respondents be justified in denying the rights to her as Parsi Zoroastrian and another can further be saggregated into two parts; one would be whether the respondents would be justified in denying the rights to a non-Parsi Zoroastrian or would be within their rights to permit the enjoyment of the rights to only Parsi Zoroastrian.

35.We may state that since the controversy in the present petition is related to allowing the entry and/or worship at Agiyari or the fire temple and for attending or participating at the funeral ceremony/at the prayers at the tower of silence, or having own funeral at the tower of silence, we shall restrict our discussion only to that extent. The rights as asserted by the petitioner or denial of the rights as contended by the respondents can better be classified as one for the entry of non-Parsi Zoroastrian at the Agiyari or the fire temple. The second is attending or participating in the funeral ceremonies/the prayers at the tower of silence and third is enjoyment of the rights for one's own funeral at the tower of silence. One may ask the first question as to whether such is prohibited by any tenants of the Parsi Zoroastrian religion and the second is whether such could be maintained on the ground of custom or tradition prevailing in the religion since many years and the third would be whether such tradition/belief prevailing amongst the followers of Parsi Zoroastrian religion comes in conflict with any constitutional rights of the other non-Parsi Zoroastrian citizen and the fourth would be the role of the State after adoption of the Constitution.

36.It may be mentioned that the petitioner has pressed in service

the right of freedom of the religion as guaranteed under Article 25 of the Constitution. As against the same, the respondents have twofold contentions; one is that such right is not in absolute as contended by the petitioner and it is further contended that even Article 26 of the Constitution guarantees the right of every religious denomination or any section thereof, to manage its own affairs in matters of religion and in the contention of the respondents whether entry should be permitted to non-Parsi Zoroastrian at Agiyari or offering of prayer should be permitted at the tower of silence or for funeral purpose of Dokmas or tower of silence should be permitted to be used or not are essential parts of Parsi Zoroastrian religion and therefore respondents are within their rights to prohibit the entry to any non-Parsi Zoroastrian.

Before we advert on the other aspects, it is necessary to record that what constitutes essential part of religion may be ascertained primarily from the doctrines of that religion itself according to its tenets, historical background and change in evolved process, etc. The concept of essentiality is not itself a determination factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are an integral part of the religion. It must be decided whether the practices or

matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the Court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 26 accords protection to it. Though the performance of certain duties is part of religion and the person performing the duties is also part of the religion or religious faith or matters of religion, it is required to be carefully examined and considered to decide whether it is a matter of religion or a secular management by the State.

37. In deciding the question as to whether a given religion practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites while dress is an integral part of the religion itself, whereas another section contends that the yellow dress and not the white dress is the essential part of the religion, how is the Court going to

decide this question. Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices, the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religions in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and tenents of its religion. Otherwise, purely secular practices which are not an essential or integral part of the religion are apt to be clothed with a religions form and may make a claim being treated as religious practices within the meaning of fundamental rights of freedom of religion as provided by the Constitution. It is true that the decision of the question as to whether a certain practice is religious practice or not, as well as the question as to whether the affair in question is an affair in the matter of religion or not, may present

difficulties because sometimes practices, religious and secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human actions from birth to death and most of the individual actions from day to day are regarded as religions in character. As an illustration, if an obviously secular matter is claimed to be matter of religion, or if an obviously secular practice is alleged to be religious practice, the Court would be justified in rejecting the claim. For example, a disposition towards making a gift for charitable or religious purpose may be a pious act of a person but the same cannot be said to be an integral part of any religion. It is not the case that the religion of Christianity commands gift for charitable or religious purpose compulsory or the same is regarded as such by the community following Christianity. Disposition of property for religious and charitable purpose is recommended in all the religions but the same cannot be said to be an integral part of it. If a person professing Christian religion does not show any inclination of disposition towards charitable or religious purpose, he does not cease to be a Christian. Even certain practices adopted by the person professing a particular religion may not have anything to do with the religion itself.

38.In the case of **Sardar Syedna Taher Saifuddin Saheb vs State Of Bombay, reported in AIR 1962 SC 853,** the Apex Court has summarized the position of law as follows:

"(34) The content of Arts. 25 and 26 of the Constitution came up for consideration before this Court in 1954 SCR 1005: (AIR 1954 S.C. 282), Ramanuj Das v State of Orissa 1954 SCR 1046: (AIR 1954 SC 400), 1958 SCR 895: (AIR 1958 S.C. 255); (Civil Appeal No.272 of 1960 D/- 17.3.1961: (AIR 1961 SC 1402), and several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to dcts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

39.The Apex Court had an occasion to consider what could be the integral part of the religion in the case of **E.R.J. Swami vs. State of Tamil Nadu, reported in AIR 1972 SC, 1586** and after considering the aforesaid view of the Apex Court in the case of **Sardar Syedna Taher Saifuddin Saheb vs The State Of Bombay (supra),** it was found by the Apex Court at paragraph 19 that the Archaka, when appointed, has to perform some religious functions, but he Archaka has never been regarded as spiritual head of any institution and it was held that the appointment of Archaka is a secular act and the

fact that in some temples the hereditary principle was followed in making the appointment would not make the successive appointments anything but secular. It was also observed that merely because after his appointment archaka performs worship is no ground for holding that the appointment is either a religious practice or a matter of religion."

40. In the case of **N. Adithayan vs The Travancore Devaswom Board & Ors., reported in (2002) 8 SCC, 106,** the question arose before the Apex Court to consider as to whether duly qualified non-Brahmin can be appointed as Poojari or perform puja in a temple and whether the appointment of duly qualified non-Brahmin as poojari can be said as violating the rights of the worshipers under Article 25 and 26 of the Constitution to practice their religion according to its tenets and to manage their own religious affairs or not. It was observed by the Apex Court at paragraphs 15, 16, 17, and 18 as under:-

"*15. As observed by this Court in Kailash Sonkar vs Smt. Maya Devi (AIR 1984 SC 600), in view of the categorical revelations made in Gita and the dream of the Father of the Nation Mahatma Gandhi that all distinctions based on castes and creed must be abolished and man must be known and recognized by his actions, irrespective of the caste to which he may on account of his birth belong, a positive step has been taken to achieve this in the Constitution and, in our view, the message conveyed thereby got engrafted in the form of Articles 14 to 17 and 21 of the Constitution of India, and paved way for*

the enactment of the Protection of Civil Rights Act, 1955.

16. It is now well settled that Article 25 secures to every person, subject of course to public order, health and morality and other provisions of Part-III, including Article 17 freedom to entertain and exhibit by outward acts as well as propagate and disseminate such religious belief according to his judgment and conscience for the edification of others. The right of the State to impose such restrictions as are desired or found necessary on grounds of public order, health and morality is inbuilt in Articles 25 and 26 itself. Article 25(2) (b) ensures the right of the State to make a law providing for social welfare and reform besides throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus and any such rights of the State or of the communities or classes of society were also considered to need due regulation in the process of harmonizing the various rights. The vision of the founding fathers of Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17. The legal position that the protection under Articles 25 and 26 extend a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion or practices regarded as parts of religion, came to be equally firmly laid down.

17. Where a Temple has been constructed and consecrated as per Agamas, it is considered necessary to perform the daily rituals, poojas and recitations as required to maintain the sanctity of the idol and it is not that in respect of any and every Temple any such uniform rigour of rituals can be sought to be enforced, dehors its origin, the manner of construction or method of consecration. No doubt only a qualified person well versed and properly trained for the purpose alone can perform poojas in the Temple since he has not only to enter into the sanctum sanctorum but also touch the idol installed therein. It therefore goes without saying that what is required and expected of one to perform the rituals and conduct poojas is to know the rituals to be performed and mantras, as necessary, to be recited for the particular deity and the method of worship

ordained or fixed therefor. For example, in Saivite Temples or VaishnaviteTemples, only a person who learnt the necessary rites and mantras conducive to be performed and recited in the respective Temples and appropriate to the worship of the particular deity could be engaged as an Archaka. If traditionally or conventionally, in any Temple, all along a Brahman alone was conducting poojas or performing the job of Santhikaran, it may not be because a person other than the Brahman is prohibited from doing so because he is not a Brahman, but those others were not in a position and, as a matter of fact, were prohibited from learning, reciting or mastering Vedic literature, rites or performance of rituals and wearing sacred thread by getting initiated into the order and thereby acquire the right to perform homa and ritualistic forms of worship in public or private Temples. Consequently, there is no justification to insist that a Brahman or Malayala Brahman in this case, alone can perform the rites and rituals in the Temple, as part of the rights and freedom guaranteed under Article 25 of the Constitution and further claim that any deviation would tantamount to violation of any such guarantee under the Constitution. There can be no claim based upon Article 26 so far as the Temple under our consideration is concerned. Apart from this principle enunciated above, as long any one well versed and properly trained and qualified to perform the puja in a manner conducive and appropriate to the worship of the particular deity, is appointed as Santhikaran dehors his pedigree based on caste, no valid or legally justifiable grievance can be made in a Court of Law. There has been no proper plea or sufficient proof also in this case of any specific custom or usage specially created by the Founder of the Temple or those who have the exclusive right to administer the affairs religious or secular of the Temple in question, leave alone the legality, propriety and validity of the same in the changed legal position brought about by the Constitution and the law enacted by Parliament. The Temple also does not belong to any denominational category with any specialized form of worship peculiar to such denomination or to its credit. For the said reason, it becomes, in a sense, even unnecessary to pronounce upon the invalidity of any such practice being violative of the constitutional mandate contained in Articles 14 to 17 and 21 of the Constitution of India.

18. In the present case, it is on record and to which we have

also made specific reference to the details of facts showing that an Institution has been started to impart training to students joining the Institution in all relevant Vedic texts, rites, religious observances and modes of worship by engaging reputed scholars and Thanthris and the students, who ultimately pass through the tests, are being initiated by performing the investiture of sacred thread and gayatri. That apart, even among such qualified persons, selections based upon merit are made by the Committee, which includes among other scholars a reputed Thanthri also and the quality of candidate as well as the eligibility to perform the rites, religious observances and modes of worship are once again tested before appointment. While that be the position to insist that the person concerned should be a member of a particular caste born of particular parents of his caste can neither be said to be an insistence upon an essential religious practice, rite, ritual, observance or mode of worship nor any proper or sufficient basis for asserting such a claim has been made out either on facts or in law, in the case before us, also. The decision in Shirur Mutt's case (supra) and the subsequent decisions rendered by this Court had to deal with the broad principles of law and the scope of the scheme of rights guaranteed under Articles 25 and 26 of the Constitution, in the peculiar context of the issues raised therein. The invalidation of a provision empowering the Commissioner and his subordinates as well as persons authorized by him to enter any religious institution or place of worship in any unregulated manner by even persons who are not connected with spiritual functions as being considered to violate rights secured under Articles 25 and 26 of the Constitution of India, cannot help the appellant to contend that even persons duly qualified can be prohibited on the ground that such person is not a Brahaman by birth or pedigree. None of the earlier decisions rendered before Seshammal's case (supra) related to consideration of any rights based on caste origin and even Seshammal's case (supra) dealt with only the facet of rights claimed on the basis of hereditary succession. The attempted exercise by the learned Senior Counsel for the appellant to read into the decisions of this Court in Shirur Mutt's case (supra) and others something more than what it actually purports to lay down as if they lend support to assert or protect any and everything claimed as being part of the religious rituals, rites, observances and method of worship and make such claims immutable from any restriction or regulation based on the other provisions of the Constitution or the law enacted to

implement such constitutional mandate, deserves only to be rejected as merely a superficial approach by purporting to deride what otherwise has to have really an overriding effect, in the scheme of rights declared and guaranteed under Part III of the Constitution of India. Any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by Courts in the country."

41.The aforesaid shows that the Apex Court found that everything claimed as being part of the religious rituals, rites, observances and method of worship and make such claims immutable from any restriction or regulation based on the other provisions of the Constitution or the law enacted to implement such constitutional mandate, deserves only to be rejected as merely a superficial approach by purporting to deride what otherwise has to have really an overriding effect, in the scheme of rights declared and guaranteed under Part III of the Constitution of India.

42.It was further observed that any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights

when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by Courts in the country.

43. We find it proper to refer to the decision of the Bombay High Court in the case of Jamsheed Kanga & Anr. Vs. Parsi Panchayat Funds and Properties and ors. in Appeal No.256/10, wherein the Division Bench of the Bombay High Court after considering the decision of Sir Dinsha Manekji Petit Vs. Sir Jamsetji Jijibhai reported at ILR Bombay 509, equivalent 11 BLR 85 and the another decision of the Bombay High Court in the case of Saklat Vs. Bella reported at AIR (12) 1925 PC 298, equivalent 28 BLR 161, when the question came for consideration before the High Court of Bombay for examining the power/authority of the trustees of the Parsi Panchayat Fund and its properties, it was observed by the Division Bench of the Bombay High Court at paragraph 22, the relevant of which reads as under:

> *"We respect and have great deference for the learning wisdom and erudition that went into the judgment of the Division Bench in Sir Dinsha Manekji Petit's case. But*

we must hasten to add that the judgment must be understood in the context of the social milieu of the age in which it was written. The guarantees of equality, liberty, freedom and dignity which the Constitution has enacted have over the last sixty years and more changed in fundamental ways the face of Indian Society and the polity. As Judges of the Constitutional Court that the High Court is, we must straddle a careful path – a path which is deferential to precedent but conscious of the Constitutional ethos and the evolving face of Indian Society."

In the very decision, at paragraph 24, it was observed as under :

24. The judgments of the Division Bench in Sir Dinsha Manekji Petit and of the Privy Council in Saklat vs Bella emphasize the following cardinal principles:

i. *The Zoroastrian religion has, as a matter of religious precept, contemplated and permitted conversion;*

ii. *The fact that conversions were not the order of the day, since the advent of the Parsis into India is attributable to peculiar circumstances of the social milieu. Justice Davar has adverted to the need felt not to antagonise other communities amidst which the Zoroastrians from Persia had migrated. Justice Beaman regarded it as a matter of caste;*

iii. *Conversion even within India to the Zoroastrian faith was by no means an anathema;*

iv. *The funds and properties endowed and dedicated to the use of those professing the Zoroastrian faith were confined to those who are Parsi Zoroastrians in the strict and rigid sense that is born to parents both of whom profess the Zoroastrian faith or to a Zoroastrian father, though the mother were an alien;*

v. *The Privy Council tempered the strictness of the doctrine by enunciating that though the trustees had the power to exclude a convert from the funds and properties endowed for the benefit of the Parsi Zoroastrians, the trustees were not bound to do so. As the Privy Council stated, the mere claim of A that B shall not share in such a benefit because B is not within the terms of the foundation is not one that Courts would*

encourage."

On the aspects of tower of silence, at paragraph 25, it was observed, the relevant of which reads as under:

"25. The Towers of Silence which are the last resting place of the Parsis are, as this Court observed in Sir Dinsha Manekji Petit, "regarded by them with sentiment of the utmost reverence". The Dokhmas are "places of the greatest sanctity" and are consecrated with elaborate religious ceremony."

> *"....Consistent with the reverence in which the Towers of Silence are held and the sanctity which is ascribed to them, the Deed of Trust mandates that the property shall be held upon trust at all times for ever and the trustees shall permit and suffer the land, towers and structures to be used by every member of the Parsi community professing the Zoroastrian religion as a place for the exposure of the dead and for the performance of religious rites and ceremonies."*

On the aspect of administration of endowment being a secular activity, after considering the various decisions of the Apex Court, in the case Raja Bira Kishore Deb vs. The State of Orissa, AIR 1964 SC 1501, Pannalal Bansilal Pitti vs. State of Andhra Pradesh (1996) 2 SCC 498, A.S. Narayana Deekshitulu Vs. State of Andhra Pradesh, (1996) 9 SCC 548, it has been observed as under:

> *"The Supreme Court held that though after appointment, a Priest may perform worship, that is no ground to hold that the appointment is either religious practice or a matter of religion. The performance of religious service, according to the tenets of the faith, is an integral part of religious faith and belief. But the service of the Priest is a secular part. A Priest who performs religious rites and ceremonies at the Towers of Silence must of necessity be a duly ordained Zoroastrian Priest. The actual performance of the religious rites and ceremonies has to be carried out by the Priest in accordance with the tenets of the faith."*

Further, at paragraph 29, it was observed thus, the relevant of which reads as under:

"There can be no gainsaying the fact that the rites and ceremonies which have to be observed at the Towers of Silence are indeed a constituent element of the Zoroastrian faith. As a matter of fact, the Appellants assert that they are. Hence, as we have stated, a priest who performs the rites and ceremonies must be a duly ordained Zoroastrian Priest who would observe and fulfill the tenets of the faith as the ceremonies are performed. This is not an area of dispute at all."

Ultimately, it was held that trustees were not entitled to prevent any duly ordained Parsi Zoroastrian members from performing Zoroastrian religious rites and ceremonies in the premises of tower of silence and to Agiyari.

The statement was made at the bar that the aforesaid decision of the Bombay High Court has been carried before the Apex Court and the matter was thereafter referred to the mediation centre for amicable settlement and is pending.

44. In the case of **Nar Hari Sastri And Others vs. Shri Badrinatha Temple Committee, reported in AIR 1952 SC 245**, the question arose for consideration of the entry to temple or 'Darshan' and the Apex Court observed at paragraph 20, the relevant of which reads as under:-

"20. Once it is admitted, as in fact has been admitted in the present case, that the temple is a public place of worship of the

Hindus, the right of entrance into the temple for purposes of 'darshan' or worship is a right, which flows from the nature of the institution itself, and for the acquisition of such rights, no custom or in memorial usage need be asserted or proved."

It was also further observed on the aspects of regulation of such rights at paragraph 21, the relevant of which reads as under:-

"21. This right of entry into a public temple is, however, not an unregulated or unrestricted right. It is open to the trustees of a public temple to regulate the time of public visits and fix certain hours of the day during which alone members of the public would be allowed access to the shrine. The public may also be denied access to certain particularly sacred parts of the temple, e.g., the inner sanctuary or as it is said the Holy of Holies' where the deity is actually located. Quite apart from these, it is always competent to the temple authorities to make and enforce rules to ensure good order and decency of worship and prevent overcrowding in a temple. Good conduct or orderly behaviour is always an obligatory condition of admission into a temple."

Thereafter, it was held that the plaintiff had legal right to enter the temple in its true sense of the expression but it can be exercised subject to the restrictions which the temple committee may impose in good faith for maintenance of order and decorum within the temple and for ensuring proper performance of customary worship.

45. We may also refer to the decision of the Apex Court in the case of Guruvayoor Devaswom Managing Committee and

Another Vs. C.K. Rajan and others reported at (2003) 7 SCC 546, wherein the issue came up for consideration before the Court was about the right of the person belonging to a particular religious denomination under Articles 25 and 26 of the Constitution and it was observed at paragraph 58, relevant of which reads as under-

> *".....The right of a person belonging to a particular religious denominations may sometimes fall foul of Articles 25 and 26 of the Constitution of India. Only when the fundamental right of a person is infringed by the State an action in relation thereto may be justified. Any right other than the fundamental rights contained in Articles 25 and 26 of the Constitution of India may either flow from a statute or from the customary laws. Indisputably a devotee will have a cause of action to initiate an action before the High Court when his right under statutory law is violated. He may also have a cause of action by reason of action or inaction on the part of the State or a statutory authority; an appropriate order is required to be passed or a direction is required to be issued by the High Court. In some cases, a person may feel aggrieved in his individual capacity, but the public at large may not."*

46.Further, on the aspect of visit by any devotee of a temple, it was observed by the Apex Court in the said decision at paragraph 78 as under:

> *"The question has been raised as to whether having regard to th fact that Sree Krishna temple can be visited by any devotee who has a right to worship Lord Vishnu can enjoy any denominational right to manage the temple. We may, however, notice that this Court in Sri Adi Visheshwara of Kashi Vishwanath Temple v. State of U.P., SCC, page 633, para 33 held:*

> *Every Hindu....has a right to entry into the Hindu temple and worship the deity. Therefore, the Hindu believers of Shaiva form of worship are not denominational worshipers. They are part of the Hindu religious form of worship.....They are not entitled to the protection, in particular, of clauses (b) and (d) of Article 26 as a religious denomination in the matter of management, administration and the governance of the temples." (See also Sri Kanyaka Parameswari Anna Satram Committee v. Commissioner, H.R.C. & E., SCC at p.304)*

47.In C.R. Jayaraman & others Vs. M. Palaniappan and others, reported at (2009) 3 SCC 425, the question arOse before the Apex Court for considering the contention as to whether as per Hindu customs, can the general public be stopped from coming inside the temple eventhough the temple is a private temple and the Apex Court at paragraph 19, observed thus -

> *"Further, a Constitution Bench of this Court in Tilkayat Shri Govindlalji Maharaj etc. vs. State of Rajasthan & Ors. [AIR 1963 SC 1638], held that where evidence in regard to the foundation of the temple is not clearly available, the answers to the questions namely, are the members of the public entitled to take part in offering service and taking darshan in the temple, are the members of the public entitled to take part in the festivals and ceremonies arranged in the temple and are their offerings accepted as a matter of right will 15 establish the character of the temple."*

Thereafter, in the facts of that case, it was found that Vinayka Temple and Ajaneya Temple were accessible to the residents and public had always regarded this temples with great esteem

and veneration and therefore, the decision that the aforesaid temples were public temples was not interfered with.

48.In the case of **State Of West Bengal & Ors vs Sri Sri Lakshmi Janardan Thakur, reported in (2006) 7 SCC, 490,** the Apex Court has observed at paragraph 15, thus :-

"15. In order to ascertain whether a trust is a private, following factors are relevant:

(1) If the beneficiaries are ascertained individuals; (2) If the grantor has been made in favour of an individual and not in favour of a deity; (3) The temple is situated within the campus of the residence of the donor; (4) If the revenue records or entries suggest the land being in possession of an individual and not in the deity. On the other hand an inference can be drawn that the temple along with the properties attached to it is a public trust:

(1) If the public visit the temple as of right.

(2) If the endowment is the name of the deity.

(3) The beneficiaries are the public.

(4) If the management is made through the agency of the public or the accounts of the temple are being scrutinized by the public."

49.In the case of **Deoki Nandan vs Murlidhar, reported in AIR 1957 SC 133,** it was observed by the Apex Court at paragraph 7 as under:-

"7. When once it is understood that the true beneficiaries of religious endowments are not the idols but the worshipers, and that the purpose of the endowment is the maintenance of that worship for the benefit of the worshipers, the question whether an endowment is private or public presents no difficulty. The cardinal point to be decided is whether it was the intention of

the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In accordance with this theory, it has been held that when property is dedicated for the worship of a family idol, it is a private and not a public endowment, as the persons who are entitled to worship at the shrine of the deity can only be the members of the family, and that is an ascertained group of individuals. But where the beneficiaries are not members of a family or a specified individual, then the endowment can only be regarded as public, intended to benefit the general body of worshipers. ..."

50. The aforesaid are the views, of course, taken in respect of testing the character of the temple or endowment whether it could be termed as private or public for Hindus or rather under the Hindu Religion.

51. As we are in the present case to consider the endowment by Parsi Zoroastrian or the Trust property created there from, reference to the view taken for a Trust created by a Parsi Lady and whether the same could be said as valid or not would be relevant. In the case of **Jamshed K. Tarachand v. Soonabai, reported in (1908) 10 BOMLR 417,** Justice Davar, after considering various principles as were placed before him of Zoroastrian Religion, observed at paragraph 112 as under:-

"112. I also find that, according to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Muktad ceremonies confers public benefits-benefits on the Zoroastrian community, on the peoples amongst whom they live, and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator. Every right-minded human

being--be he a Zoroas-trian, Christian, Mahomedan, Hindoo or Jew, believes in the efficacy of prayers prescribed by the religion he professes, and even the most indifferent and callous of them approaches the Almighty and resorts to prayers in times of sickness, difficulty or distress. Any doubt or scepticism as to efficacy of prayers addressed to the Almighty would be, to my mind, an unmistakeable sign of debased and degraded human nature."

At paragraph 169, it was observed thus:-

"169. In the course of the argument before me it has been strenuously contended that the performance of the Muktad ceremonies., results in no public benefit; that it merely has a tendency to put money in the pockets of the priest, and that the recitation of the prayers and the compliance with all the solemn rituals accompanying the performance of the ceremonies have no real efficacy and do not result in any benefit of a public nature. This identical question is dealt with by the Chief Baron, and the contention is refuted in the most effectual manner. He says:-

But when it (the Law) knows those doctrines, although it knows that according to them such *an act has the spiritual efficacy alleged, it cannot know it objectively, and as a fact, unless it also knows that the doctrines in question are true. But it never can know that they are objectively true unless it first determines that the religion in question is a true religion. This it cannot do. It not only has no means of doing so but it is contrary to the principle that all religions are now equal in Law. It follows that there must be one or two results either.*
(1) The Law must cease to admit that any Divine Worship can have spiritual efficacy to produce a public benefit; or,
(2) It must admit the sufficiency of spiritual efficacy but ascertain it according to the doctrines of the Religion whose act of worship it is.
The first alternative is an impossible one. The law by rendering all religions equal in its sight did not intend to deny that which is the basis of at least all Christian religions, that Acts of Divine worship have a spiritual efficacy. To do so would be virtually to refuse to recognise the essence of all religions.
The other result must therefore necessarily ensue. It must

ascertain the spiritual efficacy according to the doctrines of the religion in question and if according to those doctrines that Divine Service does result in public benefit either temporal or spiritual, the act must in Law be deemed charitable."

It was further observed at paragraph 170, the relevant of which reads as under:-

"170. ... If this is the belief of the community-and it is proved undoubtedly to be the belief of the Zoroastrian community-a secular judge is bound to accept that belief-it is not for him to sit in judgment on that belief-he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be in advancement of his religion and for the welfare of his community or of mankind, and say to him, "You shall not do it." This Court can only judge of the efficacy of such gifts in procuring public benefits by the belief of the donor and of the community to which he belongs-the belief of those who profess the religion-the ordained ceremonies of which the donor desires performance."

Thereafter, at paragraph 172, it was observed, thus:-

"172. To this I would add that it would be stranger still in a country like India, where superstition abounds, where each community is by the Crown left free to profess what religion it pleases-from where the doctrine of superstitious uses is rigorously excluded, where trusts of lands and moneys in perpetuity for idols and similar trusts are recognised and enforced by the Courts that a Parsi professing the Zoroastrian religion should be precluded from making a gift for the performance of religious rites and ceremonies which he is enjoined by the religion he professes to perform, and the non-performance of which, according to his religion, is a great sin. Why should he be precluded from setting apart a portion of his property and devoting it to a purpose which he believes would result in benefits to himself, his family and his community-in promoting the religion he professes and saving his descendants from committing a sin should circumstances place them in a position of inability to perform these ceremonies for

want of means. On this point in the same case Lord Justice FitzGibbon, a Protestant Judge, observes:-

Speaking' with all reverence of a faith which I do not hold touching the very mystery of Godliness; I could not impute to any individual professing the Roman Catholic religion that he regarded a gift of money for Masses as a means of securing from such a sacrifice a private and exclusive benefit for himself alone as being much less than blasphemy, and as I understand the proved doctrine of the Church, it would certainly be heresy. But the hope or belief that in some Shape or form, here or hereafter, a man's good works will follow him-an ingredient of selfishness in that sense-enters into almost every act of Charity ; and if the act is done in the belief that it will benefit others, for example, in the belief that ho who gives to the poor lends to the Lord-it can be none the less charitable because the giver looks for his reward in Heaven.

Ultimately, it was concluded by saying that Trusts and bequests of lands or money for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Muktad, Baj, Yejushni and other like ceremonies, are valid "charitable " bequests, and as such exempt from the application of the Rule of Law forbidding perpetuities.

52. In the case of **Dr. M. Ismail Faruqui vs Union Of India & Ors., reported in (1994) 6 SCC, 360,** the Constitutional Bench, by majority, had an occasion to consider the question as to whether the acquisition of any place of religious worship like Mosque, Church, Temple, etc., by the State under its

sovereign power violates Article 25 and 26 of the Constitution of India and while examining the said aspect, it was observed at paragraphs 77, 78, 79, 80, 81 and 82 as under:-

"77. It may be noticed that Article 25 does not contain any reference to property unlike Article 26 of the Constitution. The right to practise, profess and propagate religion guaranteed under Article 25 of the Constitution does not necessarily include the right to acquire or own or possess property. Similarly this right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion.

78. While offer of prayer or worship is a religious practice, its offering at every location where such prayers can be offered would not be an essential or integral part of such religious practice unless the place has a particular significance for that religion so as to form an essential or integral part thereof. Places of worship of any religion having particular

significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially.

79. A five-Judge Full Bench of the Allahabad High Court, in Raja Suryapalsingh v. U. P Govt. 18, held: "Arguments have been advanced by learned counsel on behalf of certain waqfs and Hindu religious institutions based on Articles 25(1) & 26, clause (c) of the Constitution. ... It is said that a mutawalli's right to profess his religion is infringed if the waqf property is compulsorily acquired, but the acquisition of that property under Article 31 (to which the right conferred by Article 25 is expressly subject) has nothing to do with such rights and in no way interferes with this exercise."

80. It has been contended that a mosque enjoys a particular position in Muslim Law and once a mosque is established and prayers are offered in such a mosque, the same remains for all time to come a property of Allah and the same never reverts back to the donor or founder of the mosque and any person professing Islamic faith can offer prayer in such a mosque and even if the structure is demolished, the place remains the same where the namaz can be offered. As indicated hereinbefore, in British India, no such protection was given to a mosque and the mosque was subjected to the provisions of statute of

limitation thereby extinguishing the right of Muslims to offer prayers in a particular mosque lost by adverse possession over that property.

81. Section 3(26) of the General Clauses Act comprehends the categories of properties known to Indian Law. Article 367 of the Constitution adopts 18 AIR 1951 All 674,690: 1951 All LJ 365 :1951 AWR (HC) 317 418 this secular concept of property for purposes of our Constitution. A temple, church or mosque etc. are essentially immovable properties and subject to protection under Articles 25 and 26. Every immovable property is liable to be acquired. Viewed in the proper perspective, a mosque does not enjoy any additional protection which is not available to religious places of worship of other religions.

82. The correct position may be summarised thus. Under the Mahomedan Law applicable in India, title to a mosque can be lost by adverse possession (See Mulla's Principles of Mahomedan Law, 19th Edn., by M. Hidayatullah - Section 217; and Shahid Ganj v. Shiromani Gurdwara13). If that is the position in law, there can be no reason to hold that a mosque has a unique or special status, higher than that of the places of worship of other religions in secular India to make it immune from acquisition by exercise of the sovereign or prerogative

power of the State. A mosque is not an essential part of the practice of the religion of Islam and namaz (prayer) by Muslims can be offered anywhere, even in open. Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India. Irrespective of the status of a mosque in an Islamic country for the purpose of immunity from acquisition by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular ethos of India under the Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple etc. It is neither more nor less than that of the places of worship of the other religions. Obviously, the acquisition of any religious place is to be made only in unusual and extraordinary situations for a larger national purpose keeping in view that such acquisition should not result in extinction of the right to practise the religion, if the significance of that place be such. Subject to this condition, the power of acquisition is available for a mosque like any other place of worship of any religion. The right to worship is not at any and every place, so long as it can be practised effectively, unless the right to worship at a particular place is itself an integral part of that right."

53. The aforesaid observations show that the right to practice, profess any religion included the right to acquire or own or possess the property. Similarly, such right does not extend to the right of worship at any and every place of worship so that any hindrance to worship at a particular place per se may infringe the religious freedom guaranteed under Articles 25 and 26 of the Constitution. The protection under Articles 25 and 26 of the Constitution is to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion.

54. It was also observed that the places of worship of any religion having particular significance for that religion, to make it an essential or integral part of the religion, stand on a different footing and have to be treated differently and more reverentially. The Apex Court observed that Article 367 of the Constitution adopts the secular concept of property for purposes of our Constitution. It observed that a temple, church or mosque etc. are essentially immovable properties and, therefore, a mosque does not enjoy any additional protection which is not available to religious places of worship of other religions. It further went to observe that irrespective of the status of a mosque in an Islamic country for the purpose of

immunity from acquisition by the State in exercise of the sovereign power, its status and immunity from acquisition in the secular ethos of India under the Constitution is the same and equal to that of the places of worship of the other religions, namely, church, temple etc. It was observed that it is neither more nor less than that of the places of worship of the other religions.

55.In the case of **Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors. vs V.R. Rudani & Ors, reported in (1989) 2 SCC, 691,** while considering the scope of the powers under Article 226 o the Constitution, it was observed by the Apex Court at paragraph 17 as under:-

"17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The 'public authority' for them mean every body which is created by statute--and whose powers and duties are defined by statue. So Government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities'. But there is no such limitation for our High Courts to issue the writ 'in the nature of mandamus'. Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is

a striking departure from the English law. Under Article 226, writs can be issued to "any person or authority". It can be issued "for the enforcement of any of the fundamental rights and for any other purpose".

Thereafter, at paragraph 22, the Apex Court further observed as under:-

22. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor De Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." (Judicial Review of Administrative 'Act 4th Ed. p. 540). We share this view. The judicial control over the fast expanding maze of bodies effecting the rights of the people should not be put into water-tight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the conten- tion urged for the appellants on the maintainability of the writ

petition."

56.In view of the aforesaid observations and discussions, the following can be deduced:

1. Every religion, be it Parsi Zoroastrian, be it Christian, be it Islam or Hindu showers its benefit to all mankind. But the performance of various ceremonies by the believers or religious tenants is a different aspect. All the religious places, may be temples, mosques, churches, Agiyaris are meant for the larger benefits of the mankind in general and for the followers of the said religion in particular.
2. Whether a particular place of worship is a public place or a private one, would mainly depend upon its use by the public at large and also the belief in the society to be treated so.
3. After adoption of the constitution, all religions are to be treated equally by the State.
4. Article 25 of the Constitution guarantees right to freedom of religion to all persons equally as per his own conscience and every citizen has the right to freely profess, practice and propagate any religion. Article 25(2) of the Constitution permits the State from making any laws for regulating or restricting any economic, financial, political or other secular activity which may be associated with the religious practice. It also additionally provides the power to the State to make the

laws for social welfare and for reform for Hindu religious institutions and, such extends to Sikh, Jain or Buddhist religious institution .

5. The Constitution at the same time permits every religious denomination to manage its own affairs as per Article 26 of the Constitution, of course the same is also subject to public order, morality and health. However, such right guaranteed under Article 26 applies to only integral part of the religious affairs, may be as per religious tenants or otherwise and not as per the belief or a mere tradition which are not integral part of any particular religion.

6. Hence, the conjoint reading of both the rights under Article 25 read with Article 26 shows that any citizen has the right to profess, practice, and propagate any religion, subject to the right of every religious denomination or section thereof to manage its own affair in the matter of religion and other rights guaranteed under Article 26 of the Constitution. To put it differently, if any person wants to profess and practice any religion, the same is not so prohibited but whether he or she should be permitted to enter to the place of worship or not would be a matter of religion by a particular religious denomination or a section thereof.

7. The rights guaranteed under Article 26 is to be enjoyed by any

religious denomination but it has to give equal treatment to every person professing and practicing a particular religion. Any action by any religious denomination curtailing such right of equality amongst the person professing and practicing a particular religion can be said as violative of the rights guaranteed under Article 25 of the Constitution and if such a right is violated by any particular religious denomination, or any section thereof, such person may enforce the right guaranteed under Article 25 but if against a private party and not the State within the meaning of Article 12 of the Constitution then before the Civil Court and if such is to be enforced against the State or its instrumentalities within the meaning of Article 12 of the Constitution in a petition under Article 226 of the Constitution before the constitutional Court.

8. The power under Article 226 of the Constitution of this Court for enforcement of the fundamental rights guaranteed to the citizen in normal circumstance would be against the authorities which are the State within the meaning of Article 12 of the Constitution. Such power of issuing writ may also be exercised for "any other purpose".

9. In absence of any remedial measure undertaken by any citizen or even otherwise also, it is for the State, viz., Government and the Parliament of India and the Government and the

Legislature of each State and all local or other authorities within the territory of India and under the control of Government of India to ensure that any citizen is in a position to enjoy the fundamental rights guaranteed under Part III of Constitution in general and Article 25 subject to the rights of religious denomination or any section thereof under Article 26 of the Constitution.

10. While considering the scope of Article 26 of the Constitution of any religious denomination or any section thereof, it is to be considered by the concerned Court or the authority within the meaning of Article 12 of the Constitution as to whether a particular matters of religion or religious practice or belief are integral part of the religion and such would essentially depend on the evidence adduced before the Court or the authority as the case may be. However, if it is found that such matter is not a part of integral part of the religion, then the religious institution has no right or authority to curtail the enjoyment of right to profess religion by any citizen as guaranteed under Article 25 of the Constitution.

57. The examination of the fact of the present case further shows that the rights claimed by the petitioner are in three facets – One is to attend and pray at the Agiyari(Fire Temple) and

second is to attend and participate at the funeral ceremonies at the tower of silence including sitting in the room where the body of the deceased Parsi Zoroastrian is kept and to perform every ceremonies at that place and the third is to have her own funeral at the tower of silence.

58. There is no prohibition to the petitioner or any women who is born Parsi Zoroastrian married to non-Parsi for continuing to profess Parsi Zoroastrian religion. However, while doing so, the religions denominations of the respondent, viz, Trustees of Valsad Parsi Anjuman have curtailed her rights contending that the petitioner being non-Parsi would not be entitled to enjoy such rights. The denial of such rights is on the ground that entry to Agiyaris, where the fire temple is preserved, is not available to non-Parsi. In support of the same, the materials are produced but no material is brought to our notice by any authenticated religious tenants prohibiting entry to Agiyaris by non-Parsi may be male or may be female. The respondents in the affidavit has mainly relied upon certain extract of Dastoorji Dr. Firoz M. Kotwal and the whole booklet is produced with the affidavit at Annexure-7 of Mr.Sam Rushi Chotiha, Managing Trustee of the Trust. At page 104 of the said booklet, the main principles of Zoroastrian religion are narrated by the author which says that

Zoroastrian religion accepts the opinion of one God, Lord Ahurmajad. At page 104 under the head of Nitishastra of Zoroastrian religion, it has been mentioned that Paigamber Saheb has said that "Sukh tene ke jenathi sukh bijane" (happiness for himself is such which gives happiness to others). In the very booklet, at page 115, it is mentioned that nobody has been able to find out Kimiya (alchemy) to aforesaid parcomy (person following other religion) as Zoroastrian. Even in this book also nothing is brought to our notice in which it is stated that non-Parsi Zoroastrian is prohibited to enter Agiyari. Of course, in the affidavit of the respondents, they have stated that fire temple is not only of an ordinary fire, but fire is comprising of variety of fires as per the Zoroastrian religion and is preserved at Agiyari. We are not shown any material as to how entry of a non-Parsi to Agiyari for offering the prayer would violate the integral part of Parsi Zoroastrian religion.

59. Further, the aspect may also be required to be considered as to whether a lady who is born Parsi, until marriage, she has followed Parsi Zoroastrian religion, after marriage if she is not even permitted to offer prayers at Agiyari even in capacity as non-Parsi, whether such would adversely affect the dignity as a human being for offering prayers to the almighty. On the

aspect of entry to funeral ceremony at the tower of silence and for the right to have her own funeral at the tower of silence, we find that it is not possible for us to decide on the evidences available on record as to whether such religious practices prohibiting non-Parsi is an integral part of Parsi Zoroastrian or not. A detailed fact finding inquiry may be required for such purpose. Thereafter, if it is found that they are or it is integral part of practice of Parsi Zoroastrian religion, the matter may also be required to be considered as to whether a daughter whose parent's funeral is being observed though may be non-Parsi, if not permitted to attend and participate such funeral in the tower of silence, would it affect adversely the dignity of a human being, daughter in the present case, keeping in view her natural love and affection for her parents.

60. The aforesaid in our view are the various aspects to be considered on the premise that the petitioner has acquire the religion of her husband, i.e., Hindu after marriage, more particularly, in absence of any declaration of the competent court that she has continued to profess and follow Parsi religion and therefore, to treated as Parsi for all purposes. However, the petitioner in the whole petition has not claimed any right as that of non-Parsi Zoroastrian nor she has claimed for the prayer based on her status as non-Parsi nor the

petitioner has joined any governmental agency or governmental authority for assertion or for enforcement of her rights as non-Parsi Zoroastrian female, hence we find that we need not further elaborately consider the case for grant of the relief as prayed by the petitioner claiming her status as available of a Parsi Zoroastrian woman.

61. In view of the aforesaid observations and discussions, we find issue no.2 as such would not arise but if the action of the respondent is to be tested in light of the petitioner being a natural Parsi Zoroastrian having married to a non-Parsi and consequently, having acquired Hindu religion after marriage, in absence of any declaration of the competent civil court for her continuation to follow Parsi Zoroastrian religion and her status as that of Parsi Zoroastrian, the matter could be examined and we have found it proper to examine, but it appears that in absence of any right claimed as non-Parsi Zoroastrian, subject to the aforesaid observations, no final view is expressed about justifiability of the impugned action of the respondent.

62. The third issue in our view could be answered in two ways; one would be if the right is claimed for the alleged breach of fundamental right under Article 25 of the Constitution of India, this Court can issue appropriate writ for ensuring the

enjoyment of the fundamental rights against the private respondents in a given case showing extraordinary circumstance or this Court may direct the State or its authorities to ensure the enjoyment of such fundamental rights by any citizen. However, as the right under Article 25 of the Constitution is also subject to the right of any religious denomination under Article 26 of the Constitution, we find that unless it is found by the competent court or the authority that a particular practice or the alleged action is an integral part of the religion, the issue for enjoyment of the right under Article 25 of the Constitution cannot be finalized. Therefore, no writ deserves to be issued to respondents in the present petition at this stage.

63. However, we find it proper to observe that the judgment shall not operate as a bar to the petitioner to move the appropriate civil court for declaration of her status as that of Parsi Zoroastrian female after marriage with non-Parsi nor the present judgment shall not operate as a bar to the petitioner in claiming her rights even as non-Parsi Zoroastrian before the appropriate court or authority by resorting to appropriate proceedings.

64. Subject to the aforesaid observations and discussions, rule discharged. Considering the facts and circumstances of the

case, there shall be no order as to costs.

Sd/- (JAYANT PATEL, J.)

Sd/-(R. M. CHHAYA, J.)

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. I have had the benefit of perusing a detailed opinion of brother Justice Jayant Patel taking into account various aspects of the matter. Though with the ultimate conclusion regarding the fate that this petition should meet, I am in agreement, with the opinion expressed, with respect to some of the answers to the questions formulated by the Division Bench and referred to the larger Bench, I am unable to persuade myself to agree. Facts have been elaborately recorded by Hon'ble Justice Shri Jayant Patel in his order. I would however, briefly record facts which I consider important for dealing with the issues arising in this petition.

2. Mr.Adi Contractor and Mrs. Dinaz Contractor are both Parsi Zoroastrians. Out of their wedlock, one girl child was born who was named Goolrokh. Goolrokh was thus a born Parsi Zoroastrian. Her Navjote ceremony was performed sometime in the year 1971. On or about 1.2.1991, Goolrokh married one Mahipal Gupta, a Hindu man, under the provisions of the Special Marriage Act, 1954 (here-in-after referred to as "the

Act of 1954"). It is her case that at the time of her marriage she never changed her religion. After her marriage Goolrokh Contractor thus became Goolrokh Gupta. It is her case that after the marriage she changed her first name to Neha but continued to follow her own religion.

On the premise that though there is no recognized practise in the Parsi Zoroastrian religion to prevent any woman from entering into Agiari(temple of fire) and performing puja and other ceremonies even after marriage to a non Parsi, Valsad Parsi Anjuman trust has been obstructing such women from performing such rights, Goolrokh sent letters to the respondents asserting her right to perform such ceremonies on religious occasions. When the respondents did not favourably respond to such letters, Goolrokh filed the present petition praying for a direction to the trustees of Valsad Parsi Anjuman Trust not to prevent the petitioner or any other Parsi Zoroastrian women married to a Non-Parsi under the Act of 1954 from entering into and/or worshiping at the Agiari or Fire Temple situated at Mota Parsiwad, Agiari Street, Valsad and from attending or participating at the funeral ceremonies and prayers at the Tower of Silence and having her own funeral at the Tower of Silence at Valsad.

3. The petition is founded on few simple facts. Case of the

petitioner is that even after her marriage to Mahipal Gupta under the Act of 1954, she continued to be a Parsi Zoroastrian and continued to follow her religion. Parsi Zoroastrian religion does not recognize any custom or usage preventing any woman from entering Agiari or Tower of Silence for performing religious ceremonies simply on the ground that she has married outside of her religion. She apprehends that Valsad Parsi Anjuman Trust would not permit her to perform such ceremonies only on the ground that she is married to a non Parsi Zoroastrian. She apprehends that even on important occasions such as post death ceremonies of her parents, she would be prevented from entering into the Tower of Silence. After her death, the trust would not permit her body to be brought for the funeral at the Tower of Silence situated at Valsad. It is on the basis of these facts that the petitioner has filed the above-mentioned petition.

4. Series of replies and rejoinder and further replies have been filed. The gist of the opposition of the respondents to the prayers made in this petition is as follows :

a) The petition is not maintainable since controversial issues of questions of facts of religious rights are involved.

b) Alternative remedy either in form of a suit before the Civil Court or proceedings under the Bombay Public Trust Act is

available.

c) Respondents are not State within the meaning of Article 12 of the Constitution and therefore, writ petition under Article 226 of the Constitution would not be maintainable.

d) Parsi Zoroastrian religion does not permit any woman who marries outside the religion to enter the Agiari and such other religious places where non Parsis are generally not allowed.

e) The petitioner herself has changed her name from Goolrokh to Neha. This would demonstrate that she even before the marriage converted herself to Hindu religion. At any rate after the marriage, she ceased to be Parsi Zoroastrian.

5. When the petition came up for hearing before the Division Bench on 22.10.2010, same was referred to larger Bench by passing the following order :

> "Whether, the petitioner-a born Parsi woman, by virtue of contracting a civil marriage with a non-parsi man under the Special Marriage Act, ceases to be a Parsi ?
>
> If the first issue is answered in negative, then, the question will be as to whether the respondents are justified in refusing the petitioner her rights of being a natural Parsi ? And;

Whether the High Court under *Article* 226 of the Constitution can issue a *writ* of mandamus to the respondents to grant reliefs as sought for in the present case.

As all the aforesaid issues are of greater importance, we propose that the case should be heard by the Larger Bench. It will be open to the parties to raise any other issue(s).

Post the matter before the *Hon'ble* the Chief Justice for constituting a Bench and for fixing the date of hearing."

6. It was in this background that the petition came to be heard by the Larger Bench.

7. With respect to question no.1, Hon'ble Justice Jayant Patel opined as under :

"32. A born Parsi woman by contracting civil marriage with a non-Parsi under the Special Marriage Act would cease to be Parsi and she would be deemed and presumed to have acquired the religious status of her husband unless declaration is made by the competent court for continuation of her status of Parsi Zoroastrian after her marriage. After the the declaration is made by the competent court after undertaking full fledge fact finding inquiry on the aspects as to whether after marriage, she has totally abjured Hinduism, the community to which her husband belongs and she has continued to remain as Parsi Zoroastrian and whether she has adopted/continued the religion of Parsi Zoroastrian to gain any benefit or whether the community, viz., Parsi Zoroastrian, has treated her as a

member of Parsi Zoroastrian for all purposes or not."

8. With respect to question no.(2) learned Judge opined as under

> "61. In view of the aforesaid observations and discussions, we find issue no.2 as such would not arise but if the action of the respondent is to be tested in light of the petitioner being a natural Parsi Zoroastrian having married to a non-Parsi and consequently, having acquired Hindu religion after marriage, in absence of any declaration of the competent civil court for her continuation to follow Parsi Zoroastrian religion and her status as that of Parsi Zoroastrian, the matter could be examined and we have found it proper to examine, but it appears that in absence of any right claimed as non-Parsi Zoroastrian, subject to the aforesaid observations, no final view is expressed about justifiability of the impugned action of the respondent."

9. With respect to question no.(3), learned Judge opined as under

> "62. The third issue in our view could be answered in two ways; one would be if the right is claimed for the alleged breach of fundamental right under Article 25 of the Constitution of India, this Court can issue appropriate writ for ensuring the enjoyment of the fundamental rights against the private respondents in a given case showing extraordinary circumstance or this Court may direct the State or its authorities to ensure the enjoyment of such fundamental rights by any citizen. However, as the right under Article 25 of the Constitution is also subject to the right of any religious denomination under Article 26 of the Constitution, we find that unless it is found by the competent court or the authority that a particular practice or the alleged action is an integral part of the religion, the issue for enjoyment of the right under Article 25 of the Constitution cannot be finalized. Therefore, no writ deserves to be issued to respondents in the present petition at this stage."

10. With respect I view the situation somewhat differently.

11. The Special Marriage Act 1954 is a successor legislation of the Special Marriage Act 1872 (here-in-after referred to as "the Act of 1872"). Before adverting to the provisions made in the

Act of 1954, it would be interesting to note some of the provisions and legislative changes made in the Act of 1872.

12. The Act of 1872, as it was originally enacted, applied to marriages between persons neither of whom professed the Christian, the Jewish, the Hindu, the Muhammadan, the Parsi, the Buddhist, the Sikh or Jain religion. In other words, the Act of 1872 did not apply to a marriage between persons either or both of whom professed such religions. By the Special Marriage (Amendment) Act of 19232 (here-in-after referred to as "the Amending Act of 1923"), the provisions under the Act of 1872 were made applicable to a marriage between persons each of whom professed the Hindu, the Buddhist, the Sikh or the Jain religion. Therefore, a marriage between a Hindu and a Hindu, Buddhist, Sikh or Jain could then be solemnised under the Act of 1872. However, even after the Amending Act of 1923, marriage between a Hindu and Parsi or Muhammadan,Christian, etc. could not be solemnised under the Act of 1872. It was however, open for the parties to renounce their religion and, thereafter, have the marriage registered under the Act of 1872 by making a declaration that they do not profess any of the religion mentioned therein namely, the Christian, the Jewish, the Hindu, the Muhammadan, the Parsi, the Buddhist, the Sikh or the Jain.

Another significant feature of the Act of 1872 was that unlike the Hindu law which contemplated solemnisation of marriage by performance of religious ceremonies, the Act of 1872 provided for solemnisation of marriage by declaration in the form prescribed in presence of three witnesses and the Registrar of Marriages. The Act of 1872 introduced the principles of monogamy for both the persons marrying under the said Act irrespective of their personal laws. The Act also required that to solemnise the marriage under the said Act, the man must have completed the age of 18 years and the woman the age of 14 years. Section 24 of the Act of 1872 pertained to succession to the property of any person professing the Hindu, Buddhist, Sikh or Jain religion who married under the said Act and to the property of the issue of such marriage, and provided that such succession of such property would be regulated by the provision of Indian Succession Act 1865.

13. The Act of 1872 was thus a progressive legislation making series of provisions which made departure from the personal laws of various religions prevailing at the relevant time. This Act however, did not recognise inter-religion marriages in the sense that no two persons belonging to different religions could solemnise the marriage under the Act of 1872 without renouncing their religions.

14.The Special Marriage Act of 1954 was framed by the Legislature shortly after the independence of the country. It was realised that the Act of 1872 were inadequate and certain reforms were necessary. Accordingly Special Marriage Bill was introduced in the parliament with following objects and reasons :

> "This Bill Revises and seeks to replace the Special Marriage Act of 1872 so as to provide a special form of marriage which can be taken advantage of by any person in India and by all Indian nationals in foreign Countries irrespective of the faith which either party to the marriage may profess. The parties may observe any ceremonies for the solemnization of their marriage but certain formalities are prescribed before the marriage can be registered by the Marriage Officers. For the benefit of Indian citizens abroad, the Bill provides for the appointment of Diplomatic and Consular Officers as Marriage Officers for solemnizing and registering marriage between citizens of India in a foreign country.
>
> (2) Provision is also sought to be made for permitting persons who are already married under other forms of marriage to register their marriages under this Act and there by avail themselves of these provisions.
>
> (3) The Bill is drafted generally on the lines of the existing Special Marriage Act 1872 and the notes on clauses attached hereto explain some of the changes made in the Bill in greater detail."

- Chapter II of the Act of 1954 pertains to solemnisation of Special Marriage and contains Section 4 to 14.
- Section 4 of the Act of 1954 pertains to conditions relating to solemnization of special marriages and reads as under :

other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:-

(a) neither party has a spouse living;

(b) neither party-

(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(iii) has been subject to recurrent attacks of insanity;

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;

(d) the parties are not within the degrees of prohibited relationship:-

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and

(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled In the territories to which this Act extends.

Explanation.-In this section, "custom", in relation to a person belonging to any tribe, community, group or family, means any rule which the State Government may, by notification in the Official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family:

Provided that no such notification shall be issued in relation to the members of any tribe, community, group or family, unless the State Government is satisfied-

(i) that such rule has been continuously and uniformly observed for a long time among those members;

(ii) that such rule is certain and not unreasonable or opposed to public policy; and

(iii) that such rule, if applicable only to a family, has not been discontinued by the family."

- Section 5 of the Act of 1954 pertains to notice of intended marriage and provides that when a marriage is intended to be solemnized under this Act, the parties shall give notice thereof in the prescribed form to the Marriage Officer of the district in which at-least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given. Section 6 pertains to publication of marriage notice. Section 7 pertains to objection to such marriage. Section 8 pertains to procedure on receipt of any objection. Section 11 pertains to declaration which the parties and witnesses have to sign before a marriage is solemnized.
- Section 11 of the Act pertains to declaration by parties and witnesses and reads as under :

"**11. Declaration by parties and witnesses.**-Before the

marriage is solemnized the parties and three witnesses shall, in the presence of the Marriage Officer, sign a declaration in the Form Specified in the Third Schedule to this Act, and the declaration shall be countersigned by the Marriage Officer."

- Section 12 pertains to place and form of marriage and reads as under :

"12. Place and form of solemnization.-

(1) The marriage may be solemnized at the office of the Marriage Officer, or at such other place within a reasonable distance therefrom as the parties may desire, and upon such conditions and the payment of such additional fees as may be prescribed.

(2) The marriage may be solemnized in any form which the parties may choose to adopt:

Provided that it shall not be complete and binding on the parties, unless each party says to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties,-" I, (A), take thee (B), to be my lawful wife (or husband)."

Section 13 pertains to certificate of marriage and reads as

under :

> **"13. Certificate of marriage.**-(1) When the marriage has been solemnized, the Marriage Officer shall enter a certificate thereof in the form specified in the Fourth Schedule in a book to be kept by him for that purpose and to be called the Marriage Certificate Book and such certificate shall be signed by the parties to the marriage and the three witnesses.
>
> (2) On a certificate being entered in the Marriage Certificate Book by the Marriage Officer, the Certificate shall be deemed to be conclusive evidence of the fact that a marriage under this Act has been solemnized and that all formalities respecting the signatures of witnesses have been complied with."

- Section 14 pertains to requirement of new notice when marriage has not been solemnized in three months of giving of notice to the Marriage Officer.
- Chapter III of the Act of 1954 pertains to registration of marriages celebrated in other forms.
- Section 15 thereof reads as under :

> **"15. Registration of marriages celebrated in other forms.**-Any marriage celebrated, whether before or after the commencement of this Act, other than a marriage

solemnized under the Special Marriage Act, 1872, (3 of 1872) or under this Act, may be registered under this Chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled, namely:-

(a) a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since;

(b) neither party has at the time of registration more than one spouse living;

(c) neither party is an idiot or a lunatic at the time of registration;

(d) the parties have completed the age of twenty-one years at the time of registration;

(e) the parties are not within the degrees of prohibited relationship:

Provided that in the case of a marriage celebrated before

the commencement of this Act, this condition shall be subject to any law, custom or usage having the force of law governing each of them which permits of a marriage between the two; and

(f) the parties have been residing within the district of the Marriage Officer for a period of not less than thirty days immediately preceding the date on which the application is made to him for registration of the marriage."

- Section 16 pertains to procedure for registration
- Section 18 pertains to the effect of registration of marriage under this Chapter and reads as under :

"**18. Effect of registration of marriage under this Chapter.**-Subject to the provisions contained in sub-section (2) of section 24, where a certificate of marriage has been finally entered in the Marriage Certificate Book under this Chapter, the marriage shall, as from the date of such entry, be deemed to be a marriage solemnized under this Act, and all children born after the date of the ceremony of marriage (whose names shall also be entered in the Marriage Certificate Book) shall in all respects be deemed to be and always to have been the legitimate children of their parents;

Provided that nothing contained in this section shall be construed as conferring upon any such children any rights in or to the property of any person other than their parents in any case where, but for the passing of this Act, such children would have been incapable of possessing or acquiring any such rights by reason of their not being the legitimate children of their parents"

- Chapter IV of the Act of 1954 pertains to consequences of marriage under this Act.
- Section 19 pertains to effect of marriage on member of undivided family and reads as under :

"**19. Effect of marriage on member of undivided family.-** The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jaina religion shall be deemed to effect his severance from such family."

- Section 21 pertains to succession to property of parties married under the Act and reads as under :

"**21.Succession to property of parties married under Act.-** Notwithstanding any restrictions contained in the Indian Succession Act, 1925 (39 of 1925), with respect to its application to members of certain communities,

succession to the property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this section that Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Section that Intestates) had been omitted therefrom."

- Section 21A pertains to Special provision in certain cases and reads as under ;

> **"21A Special provision in certain cases.-**Where the marriage is solemnized under this Act of any person who professes the Hindu, Buddhist, Sikh or Jaina religion with a person who professes the Hindu, Buddhist, Sikh or Jaina religion, section 19 and section 21 shall not apply and so much of section 20 as creates a disability shall also not apply"

15. There are other provisions in the Act in the later portion with respect to restitution of conjugal rights and judicial separation, with respect to void and voidable marriage and of divorce including the divorce by mutual consent. It is not necessary to note all such provisions except to record that large number of provisions have been made in the Act of 1954 to keep pace with the changing times. The Act of 1954 thus is a progressive

legislation in laws of marriage, divorce, inheritance,etc.

16.In a major departure from the Act of 1872, the Act of 1954 made provision for solemnization of marriage between two persons belonging to any religion as long as they fulfill the conditions contained in Section 4 of the Act. In fact section 4 of the Act of 1872 starts with a non obstinate clause providing that notwithstanding anything contained in any other law for the time being in force relating to solemnization of marriages, a marriage between any two persons maybe solemnized under this Act, if at the time of of the marriage the conditions contained in the said section are fulfilled. None of these conditions require that the man and woman must belong to same religion. In fact post independence in tune with the constitutional philosophy of a secular State, the above provisions appear to have been made which would enable two persons belonging to two different religions to solemnise the marriage without either of them renouncing his or her religion or converting into the religion of the to be spouse. As already noted, the Act of 1872 did not have any such provision recognizing the marriages between two persons belonging to different religions solemnizing the marriage while still retaining their respective religious identity. From the objects and reasons we gather that the Act of 1954 was enacted to

replace the Act of 1872 so as to provide a special form of marriage which can be taken advantage of by any persons in India and by all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess.

17. In addition to large number of progressive measures in the Act of 1954 with respect to marriage, divorce, maintenance, inheritance and legitimacy of children, this is one of the most basic, most essential and fundamental feature of the Act. In absence of such provision contained in Section 4 of the Act, it would not be possible for two persons belonging to different religions to solemnize a valid marriage while still retaining their respective identities. Section 4 thus enables two persons belonging to different religions also to enter into a valid marriage as long as they fulfill conditions contained in the said section such as neither party is having a spouse living, the parties are not within the degrees of prohibited relationship unless the customs governing at-least one of them permit such marriage, etc.

18. To my mind, this provision is of great significance. Personal religious laws of different religions would obviously not recognize inter-religion marriages unless of-course one party to such marriage is prepared to renounce his/her religion and

accept conversion to the religion of the spouse and such conversion is recognized by such religion. In a secular State and the Constitutional philosophy that we have adopted, it would be impossible to imagine that two persons belonging to different religions would not be permitted to solemnize a valid marriage unless, at-least one of them is prepared to renounce his or her religion and accept conversion. Therefore, Section 4 of the Act of 1954 makes a special provision also enabling such couples to solemnize the marriage while still retaining their respective religious identities and sentiments. Such provision would apply notwithstanding anything contained in any other law for the time being in force. This is in tune with the Constitutional ethos which envisages a secular State with liberal society.

In case of **Valsamma Paul (MRS) v. Cochin University and others** reported in (1996) 3 Supreme Court Cases 545, the Apex Court observed as under :

> "16. The Constitution seeks to establish secular socialist democratic republic in which every citizen has equality of status and of opportunity, to promote among the people dignity of the individual, unity and integrity of the nation transcending them from caste, sectional, religious barriers fostering fraternity among them in an

integrated Bharat. The emphasis, therefore, is on a citizen to improve excellence and equal status and dignity of person. With the advancement of human rights and constitutional philosophy of social and economic democracy in a democratic polity to all the citizens on equal footing, secularism has been held to be one of the basic features of the Constitution (Vide : S.R. Bommai v. Union of India, (1994) 3 SCC 1 and egalitarian social order is its foundation. Unless free mobility of the people is allowed transcending sectional, caste, religious or regional barriers, establishment of secular socialist order becomes difficult. In State of Karnataka v, Appu Balu Ingale & Ors., AIR (1993) SC 1126 this Court has held in paragraph 34 that judiciary acts as a bastion of the freedom and of the rights of the people. The Judges are participants in the living stream of national life, steering the law between the dangers of rigidity and formlessness in the seemless web of life. Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future to decide objectively, disengaging himself/herself from every

personal influence or predilections. The Judges should adapt purposive interpretation of the dynamic concepts under the Constitution and the act with its interpretive armoury to articulate the felt necessities of the time. Social legislation is not a document for fastidious dialects but means of ordering the life of the people. To construe law one must enter into its spirit, its setting and history. Law should be capable to expand freedom of the people and the legal order can weigh with utmost equal care to provide the underpinning of the highly inequitable social order. Judicial review must be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are required to be removed re-adjusting the social order through rule of law. In that case, the need for protection of right to take water, under the civil Rights Protection Act, and the necessity to uphold the constitutional mandate of abolishing untouchability and its practice in any form was emphasised,

21. The Constitution through its Preamble, Fundamental Rights and Directive Principles created secular State

based on the principle of equality and non-discrimination striking a balance between the rights of the individuals and the duty and commitment of the State to establish an egalitarian social order. Dr. K.M. Munshi contended on the floor of the Constituent Assembly that

"we want to divorce religion from personal law, from what may be called social relations, or from the rights of parties as regards inheritance or succession. What have these things got to do with religion, I fail to understand? We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If, how-ever, in the past, religious practices have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation" (Vide : Constituent

Assembly Debates, Vol. VII 356-8)."

19. To my mind, therefore, the petitioner was well within her right to retain her religious identity, continue to follow the Parsi Zoroastrian religion and to be recognised as Parsi Zoroastrian even after the marriage with Mahipal Gupta. Section 19 contained in the Act of 1954 applies only to persons professing Hindu, Buddhist, Sikh or Jain religion and provides for automatic severance from the undivided family of a person who solemnizes the marriage under the Act of 1954. In my opinion, such provision would have the effect of automatic severance from the undivided family of the member who has solemnized the marriage under the Act and has no relation to his religious identity. Severance from undivided family is quite different from losing religious identity. In any case, this section does not apply to the petitioner who is neither Hindu, Buddhist, Sikh or Jain.

20. Section 21 only provides that in case of persons whose marriages have been solemnized in the Act of 1954, devolution of their properties and property of the issue of such marriage shall be regulated by the provisions of the Indian Succession Act. In other words, the devolution of the properties of the persons marrying under the Act of 1954

would not be governed by the personal laws but by the provisions made under the Indian Succession Act. If the person marrying under the Act of 1954 is a Parsi, the Special Rules mentioned in Chapter-III of Part V will not apply in his case and he would be subjected to the general rules of intestate succession provided in the Indian Succession Act. Section 21A of the Act makes exception to the rules made in Sections 19 and 21 where marriages have been solemnized under the Act of 1954 between any person who professes Hindu, Buddhist, Sikh or Jain religion and another professing any one of these religions. In simple terms, in case of marriage between two persons both professing either Hindu, Buddhist, Sikh or Jain religion, severance from joint family provided under Section 19 and succession as per the Indian Succession Act instead of personal laws as provided in Section 21, would not apply.

21. None of these provisions govern or even provide any indication regarding religious identity of a woman who marries a person belonging to another religion under the Act of 1954. Section 4 which starts with a non-obstinate clause is a strong indication that any person solemnizing marriage under the Act of 1954 does not have the obligation to relinquish the religion be it husband or wife nor is required to embrace the

religion of the spouse. Even otherwise the concept of deemed conversion of wife into the religion of husband unless the contrary is established before the Court, would lead to numerous complications. Firstly, relinquishment of a religion and embracing another one is a matter of faith, ordinarily preceded by ceremonies prescribed under the respective religions and coupled with the intention of person to relinquish one religion and embrace the other. To my mind, there cannot be any concept of deemed conversion without either the necessary ceremonies having been performed or person under consideration having any intention to convert.

In case of **Lily Thomas and others v. Union of India and others** reported in (2000) 6 Supreme Court Cases 224, a Hindu husband converted into Islam and remarried even though his first wife to whom he married under the Hindu law was still surviving. He was faced with prosecution for bigamy punishable under Section 494 of IPC. The Apex Court in this context observed as under :

"38. Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a super- natural being; it is an object

of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu Law, Marriage is a sacrament. Both have to be preserved."

In case of **Ganpat v. Returning Officer and others** reported in (1975) 1 Supreme Court Cases 589, in the context of challenging election of the returned candidate on reserved constituency on the ground inter-alia that the returned candidate though originally belonged to Schedule Caste, later on converted into Buddhism, Apex Court observed as under :
In this connection it is necessary to remember that Hinduism is a very broad based religion. In fact some people take he view

that it is not a religion at all on the ground that there is no one founder and no one sacred book for the Hindus. This, of course, is a very narrow view, merely based on the comparison between Hinduism on the one side and Islam and Christianity on the other. But one knows that Hinduism through the ages has absorbed or accommodated many different practices, religious as well as secular, and also different faiths. One of the witnesses has described that he considered Buddha as the 11th Avtar. Indeed there are historians and sociologists who take the view that Buddhism disappeared from India not by any other means but by being absorbed into Hinduism. Therefore, if a certain community in a spirit of protest says that they would give up Hinduism and adopt Buddhism it is not likely to make much change either in their beliefs or in their practices. Centuries of habit and custom cannot be wiped out overnight. While in the case of highly educated members who have chosen the new religion the change might make a difference in their attitude and perhaps in their habits and customs, to the vast majority it is likely to make very little difference. Merely because in a public meeting Dr. Ambedkar and Mrs. Ambedkar and a large number of people openly got themselves converted to Buddhism it does not automatically follow that all the members of the Scheduled Castes followed

them in their footsteps. It does not even mean that all Mahars, who seem to form the largest element among the new Buddhists, became Buddhists. Hinduism is so tolerant and Hindu religious practices so varied and eclectic that one would find it difficult to say whether one is practising or professing Hindu religion or not. Especially when one is born a Hindu the fact that he goes to a Buddhist temple or a church or a durgah cannot be said to show that they are no more Hindus unless it is clearly proved that they have changed their religion from Hinduism to some other religion. In Tamil nadu in Nagapatnam there is a Muslim Durgah the majority of pilgrims to which are Hindus. In the same, town there is a church Vellankanni called Lourdes of the East after the famous Lady of the Lourdes in France. In Andhra Hindus have names like Mastan Ayya or. Hussain Amma named after Muslim saints whose durgah are near their places."

22. Further there are many religions which do not recognize conversion. If the husband belongs to such a religion say for example, Parsi which religion does not accept conversion and his wife were to be a non Parsi be Hindu, Muhammadan or Christian or anything, in such a case, what would be her status if we accept the principle of automatic deemed conversion into

the religion of her husband upon her marriage to a Parsi gentleman under the Act of 1954?

23. The respondents have however, contended that Goolrokh must have converted to Hinduism before marriage. This they contend on the basis of two factors. Firstly, that she has changed her name to Neha and secondly that she would, after marrying to Mahipal Gupta, according to Hindu rights, have registered her marriage under the Act of 1954.

24. The petitioner has produced certificate of marriage issued by the Marriage Registrar. The certificate indicates that it is issued under Section 13 of the Act of 1954 and records that Mahipal Gupta and Goolrokh Contractor appeared before him along with three witnesses and made the necessary declaration required under Section 11 of the Act and that such marriage under the Act was solemnized between them in his presence.

25. Following important aspects emerge from this certificate :

a) That the certificate of marriage is issued under section

13 of the Act of 1954.

b) That the marriage was solemnized between Mahipal Gupta and Goolrokh Contractor before the Marriage Officer in presence of these witnesses.

c) Necessary declaration as required under Section 11 of the Act was made by them.

d) The marriage was thus solemnized between two persons in presence of the officer.

e) Under sub-section (2) of Section 13, such a certificate is deemed to be conclusive evidence of the fact that marriage under the Act had been solemnized and that all formalities respecting the signatures of witnesses have been complied with.

26. Goolrokh married Mahipal Gupta under the Act of 1954 thus becomes an established fact. Section 15 which pertains to registration of marriage celebrated in other forms is a separate and distinct provision as compared to provisions made for solemnization and registration of marriages solemnized under the Act of 1954. While Section 13 pertains to registration of

marriages solemnized under the Act of 1954, Section 15 pertains to registration of marriages celebrated in other forms. It enables the

parties who have celebrated marriages in other forms to get such marriage registered under the Act of 1954. As per Section 18, the effect of the registration would be that the marriage would as per the date of such entry into the Marriage Register Book be deemed to be a marriage solemnized under the Act of 1954. In other words, such registration would give rise to a deeming fiction and marriage though previously solemnized in other forms outside the Act of 1954 from the date of entry in the Marriage Register Book would be deemed to be one solemnized under the Act of 1954. Parties to such marriages would then on be governed by the provisions contained in the Act of 1954 for purposes such as divorce, re-marriage after divorce, inheritance, etc.

27. Declaration to be made under Section 11 of the Act is provided in the third schedule. Such schedule in turn provides for separate declaration to be made by the bridegroom and the bride. Each one of them have to declare that he/she is at present unmarried (or widower or divorcee). Fourth Schedule provides for Certificate of marriage to be issued under Section 13 of the Act as under :

"I,E.F. hereby certify that on the _____day of ___19____, A.B. and C.D. appeared before me and that each of them, in my presence and in the presence of three witnesses who have signed hereunder, made the declarations required by section 11 and that a marriage under this Act was solemnized between them in my presence."

The certificate of marriage celebrated in other forms is prescribed in the Fifth Schedule as per Section 16 and reads as under :

"I,E.F. hereby certify that A.B. and C.D. appeared before me this _____day of ___19____, and that each of them, in my presence and in the presence of three witnesses who have signed hereunder, have declared that a ceremony of marriage has been performed between them and that they have been living together as husband and wife since the time of their marriage, and that in accordance with their desire to have their marriage registered under this Act, the said marriage has, this _____day of _____19___been registered under this Act, having effect as from...."

From the above also, it can be seen that the marriage solemnized under Sections 11 and registered under 13 of the Act which provisions are contained in Chapter-II are those solemnized under the Act of 1954 where the bride and

bridegroom are previously unmarried(or widower or divorcee). In contrast the marriages registered under Sections 15 read with Section 16 of the Act which provisions are contained in Chapter-III pertaining to registration of marriages celebrated in other forms are those which have already been preformed previously and which the parties to such marriages desire that be registered under the Act of 1954.

28.It is abundantly clear that the petitioner married Mahipal Gupta under the Act of 1954. There is nothing on record to suggest that while still doing so, she converted herself into Hindu religion though the same was not required. Simply because she adopted Hindu sounding name of Neha, it cannot be presumed that she relinquished her religion and embraced Hindu religion before or even after her marriage. In case of **M Chandra v. M. Thangamuthu and another** reported in (2010) 9 Supreme Court Cases 712, the Apex Court observed : "27) We must remember, as observed by this Court in Ganpat's case, Hinduism is not a religion with one God or one Holy Scripture. The practices of Hindus vary from region to region, place to place. The Gods worshipped, the customs, Traditions, Practice, rituals etc, they all differ, yet all these people are Hindus. The determination of the religious acceptance of a person must be not be made on his name or his

birth. When a person intends to profess Hinduism, and he does all that is required by the practices of Hinduism in the region or by the caste to which he belongs, and he is accepted as a Hindu by all persons around him."

29. **My answer to question no.1 therefore, is in negative. In other words a woman who is born Parsi Zoroastrian does not cease to be so merely by virtue of solemnizing the marriage under the Act of 1954 with a man belonging to another religion.**

30. This would bring me to next two questions which I find convenient to discuss together. Whether the Parsi Zoroastrian religion prohibits entry of a Parsi lady who is married outside in other community, in the religious places such as Agiari or from attending funeral ceremonies at the Tower of Silence are hotly disputed questions of facts. Case of the petitioner is that Parsi Zoroastrian religion does not provide any such restriction. The respondents on the other hand have produced literature to contend to the contrary. Both the sides however, agree that Parsi Zoroastrian religion does not have religious dictates. Whatever, religious books written having been lost or become extinct and at present no original literature in this regard is available. The petitioner has referred to certain other Parsi Trusts to contend that such trusts do not exclude Parsi

Dissenting opinion of Justice Kureshi

women who marry outside of their religion. She has also placed reliance on the opinion of scholars. Equally voluminous material is produced by the respondents to contend to the contrary.

31. Therefore, the question whether the Parsi Zoroastrian religion imposes such restrictions or whether over a period of time customs which have the force of law have developed to this effect are disputed questions of fact which cannot be judged in the present petition. Elaborate evidence shall have to be examined before anyone can come to any definite conclusion in this regard, which would not be convenient to do in a writ petition.

32. I am also of the opinion that the respondents not being the State within the meaning of Article 12 of the Constitution of India, nor discharging any public function or any public duty, petition under Article 226 of the Constitution seeking writ of mandamus is not maintainable. One does not need to refer to elaborate case laws to back these propositions. In case of **The Praga Tools Corporation v. Shri C.A. Imanual and others** reported in 1969(1) Supreme Court Cases 585, a writ petition under Article 226 of the Constitution came to be filed before the High Court against the Company incorporated under the Companies Act. The petitioner had prayed for writ of

mandamus. High Court held that petition was not maintainable against the company being one registered under the Companies Act and not having statutory duty or function to perform. High Court however, granted a declaration in favor of three workmen which was challenged by the company before the Supreme Court. The Apex Court observed that :

> "6. In our view the High Court was correct in holding that the writ petition filed under Art. 226 claiming against the company mandamus or an order in the nature of mandamus was misconceived and not maintainable. The writ obviously was claimed against the company and not against the conciliation officer in respect of any public or statutory duty imposed on him by the Act as it was not he but the company who sought to implement the impugned agreement. No doubt, Art. 226 provides that every High Court shall have power to, issue to any person or authority orders and writs including writs in the nature of habeas corpus, mandamus etc., or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a

sufficient legal interest. Thus, an application for mandamus will not lie for an order of restatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. (see Sohan Lal v. Union of India) (1). In Regina v. Industrial Court & Ors. (2) mandamus was refused against the Industrial court though set up under the Industrial Courts Act, 1919 on the ground that the reference for arbitration made to it by a minister was not one under the Act but a private reference. "This Court has never exerciseda general power" said Bruce, J., in R. v. Lewisham Union to enforce the performance of their statutory duties by publicbodies on the application of anybody who chooses to apply fora mandamus. It has always required that the applicant for a mandamus should have a legal and a specific right to enforce the performance of those duties". Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or an inferior

tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for ins-Lance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities. (cf. Halsbury's Laws of England, (3rd ed.) Vol. 11, p. 52 and onwards).

7. The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was

right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company."

In case of **Executive Committee of Vaish Degree College, Shamli and others v. lakshmi Narain and others** reported in (1976) 2 Supreme Court Cases 58, the Apex Court observed that before an institution can be considered as a statutory body, it must be established that it was created under the statute and owes its existence to the statute.

In case of **G. Bassi Reddy v. International Crops Research Institute and another** reported in (2003) 4 Supreme Court Cases 225, the Apex Court observed as under :

"27. It is true that a writ under Article 226 also lies against a 'person' for "any other purpose". The power of the High Court to issue such a writ to "any person" can only mean the power to issue such a writ to any person to whom, according to well established principles, a writ lay. That a writ may issue to an appropriate person for the enforcement of any of the rights conferred by Part III is clear enough from the language used. But the words "and for any other purpose" must mean "for any other purpose for which any of the writs mentioned would,

according to well established principles issue.

28. A writ under Article 226 can lie against a "person" if it is a statutory body or performs a public function or discharges a public or statutory duty [Praga Tools Corporation v. C.A. Imanual, (1969) 1 SCC 585; Andi Mukta Sadguru Trust v. V.R. Rudani, (1989) 2 SCC 691, 698; VST Ind. Ltd. v. VST Ind. Workers' Union & Another, (2001) 1 SCC 298]. ICRISAT has not been set up by a statute nor are its activities statutorily controlled. Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity....."

33. In the present case, admittedly respondents are trustees of Valsad Parsi Anjuman trust. It is not even the case of the petitioner that Valsad Parsi Anjuman trust is a State within the meaning of Article 12 of the Constitution. The writ would be maintainable if it is found that respondents perform a public function or discharge a public duty or statutory duty. In case of **G. Bassi Reddy**(supra) it was observed that it is not easy to define what a pubic function or public duty is, it can

reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacities.

34.Judged from this yardstick nothing has been pointed out to us to hold that Valsad Parsi Anjuman trust performs a public function or discharges a statutory duty. It is a religious charitable trust managing religious places and properties. To my mind, therefore, on this ground also writ petition is not maintainable.

35.My answer therefore, to question no.2 is that such question cannot be decided in the present writ petition being purely disputed question of fact.

36.My answer to question no.3 is that the writ petition under Article 226 of the Constitution for issuance of writ of mandamus against the present respondent for the relief claimed in the petition is not maintainable.

37.Before closing, however, I would like to briefly touch on the question of validity of so-called custom or usage denying a Parsi Zoroastrian women certain rights upon her marriage to a

non Parsi. As observed earlier, proof of any such custom is hazy and at best inconsistent. Whether such a custom or usage exists is yet to be established.

38.Learned counsel Shri Kavina however, urged and urged again to mandate to the respondents to discard such custom, usage or practice even if there was one on the ground that religious heads must discard such outdated customs keeping in tune with the changing times.

39.To my mind, it is not the function even the power of the Court to mandate discarding of old customs merely on the ground that with passage of time, such customs have become outdated. If at all, it is for the legislature to make laws outlawing such customs if so found necessary to effect such change keeping pace with the changing ethos and aspirations of the society.

40.It is of-course open to the Courts of law established in the country to examine whether such custom or usage has fallen foul to any of the Constitutional provisions and in particular those contained in Chapter-III of the fundamental rights. In this context, it is also open for the Courts to view the

Constitution, as is often said, as a living organism, an organic body evolving with passage of time. In case of **M/s. Video Electronics Pvt. Ltd. and another v. State of Punjab and another** reported in AIR 1990 Supreme Court 820, wherein the Apex Court observed as under:

"Constitution of India is an organic document. It must be so construed that it lives and adapts itself to the exigencies of the situation, in a growing and evolving society, economically, politically and socially. The meaning of the expressions used there must, therefore, be so interpreted that it attempts to solve the present problem of distribution of power and rights of the different States in the Union of India, and anticipate the future contingencies that might arise in a developing organism. Constitution must be able to comprehend the present at the relevant time and anticipate the future which is natural and necessary corollary for a growing and living organism. That must be part of the constitutional adjudication. Hence, the economic development of States to bring these into equality with all other States and thereby develop the economic unity of India is one of the major commitments or goals of the constitutional aspirations of this land. For working of an orderly society economic equality of all the States is as much vital as economic unity."

In case of **Ashoka Kumar Thakur v. Union of India** reported ion AIR 2008 SC(Supp)I, the Apex Court observed that the Constitution of India is not intended to be static. It is

by its very nature dynamic. It is a living and organic thing. The Constitution reflects the belief and political aspirations of those who had framed it.

41. In this context if it is found that any custom or usage is contrary to the fundamental rights guaranteed under the Constitution by virtue of Article 13, such custom or usage would be void. One may refer to the case of **N. Adithayan v. Travancore Devaswom Board and others** reported in (2002) 8 Supreme Court Cases 106, in which the Apex Court observed :

"16. It is now well settled that Article 25 secures to every person, subject of course to public order, health and morality and other provisions of Part-III, including Article 17 freedom to entertain and exhibit by outward acts as well as propagate and disseminate such religious belief according to his judgment and conscience for the edification of others. The right of the State to impose such restrictions as are desired or found necessary on grounds of public order, health and morality is inbuilt in Articles 25 and 26 itself. Article 25(2) (b) ensures the right of the State to make a law providing for social welfare and reform besides throwing open of Hindu

religious institutions of a public character to all classes and sections of Hindus and any such rights of the State or of the communities or classes of society were also considered to need due regulation in the process of harmonizing the various rights. The vision of the founding fathers of Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17. The legal position that the protection under Articles 25 and 26 extend a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion or practices regarded as parts of religion, came to be equally firmly laid down."

xxxxxxx

18..... The attempted exercise by the learned Senior Counsel for the appellant to read into the decisions of this Court in Shirur Mutt's case (supra) and others something more than what it actually purports to lay down as if they lend support to assert or protect any and everything claimed as being part of the religious rituals, rites, observances and

method of worship and make such claims immutable from any restriction or regulation based on the other provisions of the Constitution or the law enacted to implement such constitutional mandate, deserves only to be rejected as merely a superficial approach by purporting to deride what otherwise has to have really an overriding effect, in the scheme of rights declared and guaranteed under Part III of the Constitution of India. Any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by Courts in the country."(underline supplied)

42. In this context question may arise whether any such custom even if it exists would not be in breach of fundamental right to profess any religion. The question would also arise whether any practise which prevents a person from performing the last rites of her parents or prevents even her presence when such rites are being performed, would be opposed to the basic

human rights. Question would also arise whether any custom or usage which prevents a person from being cremated upon death as per the religious rites would not be opposed to fundamental right to profess any religion.

43.I leave such questions to be decided in appropriate case if instituted before appropriate forum.

44.In the result, subject to above observations, I am of the opinion that the petition is required to be dismissed.

(Akil Kureshi,J.)

// TRUE COPY//

Top

125

IN THE SUPREME COURT OF INDIA
[Order XVI Rule 4(1) (a)]

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION
(Under Article 136 of the Constitution of India)

Special Leave Petition (Civil) No. ____of 2012

(WITH PRAYER FOR INTERIM RELIEF)

(Against the Impugned final judgment and order dated March 23, 2012 passed by the Hon'ble High Court of Gujarat in SCA No. 449 of 2010)

To,

Hon'ble The Chief Justice of India
and His Companion Judges of the
Hon'ble Supreme Court of India.

The Humble Petition of the Petitioner above named

MOST RESPECTFULLY SHEWETH:

1. That the present Petition is filed by the Petitioner against the Impugned final Judgment and Order dated March 23, 2012 passed by the Hon'ble High Court of Gujarat (hereinafter referred to as "**Impugned Judgment**") in Special Civil Application No. 449 of 2010 titled as *Goolrookh M. Gupta, Maiden Name Goolrookh A. – Versus – Burjor Pardiwala, President & Ors.* It is regretful to note at the very outset that the said Impugned Judgment is a grave affront to India's Constitutional order which mandates adherence to basic human rights, dignity, religious freedom, gender equality and a uniform civil code.

2. **QUESTIONS OF LAW:**

The Impugned Judgment raises the following Questions of Law which deserve the consideration of this Hon'ble Court:

a) Whether the Impugned majority judgment of the Hon'ble High Court has not committed serious error of law in holding that by virtue of contracting a marriage under **the Special Marriage Act, 1954**, a woman ceases to profess the religion of her birth / choice and automatically merges into the religion of her husband?

b) Whether the **Special Marriage Act, 1954**, is not an Act which was specially enacted by the Legislature to register a special form of marriage, where neither of the parties to the marriage is required to renounce their religion?

c) Whether the religious freedom guaranteed to a woman under Article 25 of the Constitution of India automatically ceases upon her marriage to a man professing a different religion?

d) Whether holding that a woman's religious identity is dependent upon that of her father before her marriage and that of her husband after her marriage does not flout the guarantee of religious freedom accorded to all citizens of India under Article 25 as well as the rights guaranteed by Articles 14, 15 and 21 of the Constitution?

e) Whether such conclusion arrived at by the Impugned majority judgment is not in complete derogation of the guaranteed fundamental right of the Petitioner under Articles 25 and 26 of the Constitution in the matter of religious faith and practices?

f) Whether, in the absence of any provision of law to that effect, a Court is entitled to create a legal fiction by which a woman entering into an inter-religious marriage is deemed to have changed her religion after marriage to that of her husband, and whether by purporting to create such legal fiction the Court is exceeding its jurisdiction and purporting to legislate?

g) Whether the Court was entitled to create a legal fiction by which a Parsi woman practicing the Zoroastrian religion is deemed, upon marrying a non-Parsi, to have changed her religion to that of her husband, despite the Court coming to a finding that "*There is no prohibition to the petitioner or any women [sic] who is born Parsi Zoroastrian married to non-Parsi for continuing to profess Parsi Zoroastrian religion*"?

h) When the Special Marriage Act, 1954 was enacted as a progressive legislation in respect of marriage to enable (in accordance with the spirit of the Constitution) two persons belonging to different religions to enter into marriage without either having to renounce his or her religion or convert to the religion of the other, and with the intention of changing the position obtaining under the Special Marriage Act, 1872 (which it repealed), whether a Court can create a legal fiction in respect of a marriage solemnized under the Special Marriage Act, 1954 to undo the change introduced by such legislation?

i) Whether a Court can create a general deeming fiction relating to change of religion without even considering the practices, ceremonies etc. or the intention to convert that is considered essential by various religions for conversion to such religion?

j) Whether such a conclusion arrived at by the Impugned majority judgment is not in complete negation of basic human right as to independence and existence of one's personality and faith of religion?

k) Whether a Court can create a deeming fiction whereby a person not considered fit for admission to a particular religion by a particular religious community is thrust into the community by the mere fact of marriage to a member of such community?

l) Whether a Court can create a deeming fiction that compels every woman who does not intend to adopt her husband's religion after an inter-religious marriage, to file legal proceedings and lead evidence therein to establish that she continues to practice the same religion that she did prior to such marriage, and to obtain a declaration to that effect?

m) Whether in law it is permissible to equate race, religion and caste, to use the said terms interchangeably and to rely on authorities deciding questions regarding caste in matters involving questions regarding change of religion?

n) Whether a person's race can change by reason of marriage and whether a woman who is a Parsi by race ceases to be such upon marriage to a non-Parsi?

o) Whether a Court is entitled to rely on a change of a person's name to presume a change of religion and/or race?

p) Whether the children born out of a wedlock registered under the Special Marriage Act, 1954, are automatically deemed to be professing the religion of their father?

q) Whether imposition of religion, faith, and belief upon women and children – based only upon the woman's marriage to a person belonging to another religion - does not flout the guarantees of equality, dignity and freedom as set forth in Articles 14, 15, 21 and 25 of the Constitution of India?

r) Whether applying different rules of conduct, especially against women, by different religious denominations of the Parsi community in India, does not ridicule the right granted to religious denominations under Article 26?

s) Whether religious obscurantism encouraged by a select group of people of a particular religion would not fall foul of Articles 14, 15 and 26 of the Constitution of India especially when it discriminates between men and women without their being any religious tenet whatsoever to support such obscurantism?

t) Whether the Impugned majority judgment is not *ex facie* inconsistent, irreconcilable, incoherent and incongruous in approach; in reasoning legal and logical and leads to conclusions which have far reaching consequences affecting basic human and fundamental rights of all women entering into civil and inter-religious marriages across all religions?

u) Whether the Impugned majority judgment would not result in highly anomalous and unwarranted consequences affecting dignity of a woman and right to religion by making her religion dependent upon marriage and wheeling along with marriage ignoring the consequence of a probable divorce/ dissolution of marriage?

v) Whether Article 26 of the Constitution of India permits the Trustees of a Trust to go beyond the secular precincts of their Trust Deed and become self proclaimed custodians of religion imposing discriminatory rules against women of a particular religion?

w) Where property is vested upon trust for the benefit of certain persons, can the trustees seek to rely on provisions or principles outside the trust deed to exclude intended beneficiaries from the benefits of such trust property, and whether it can be claimed on the basis of such extraneous provisions or principles that disputed

questions of fact arise, when all that is required is interpretation of the provisions of the trust deed?

x) Whether the true meaning and purport of the religious freedom guaranteed under Article 25 and the dignity of an individual guaranteed under Article 21 of the Constitution of India, does not require that a person should be free to choose his / her own religious faith?

y) Whether refusing a Parsi woman, married to a non-Parsi man under the Special Marriage Act, 1954, (especially one who has continued to follow her Parsi Zoroastrian religion even after her marriage), from entering the Fire Temple or Tower of Silence or participating in religious rites and ceremonies thereat, only because she is married to a non-Parsi, while permitting a Parsi man (married to a non-Parsi) for the same, is not an affront to the constitutional right to equality enshrined in Article 14 & 15 of the Constitution of India as well as International conventions such as the Convention for Elimination of All Forms of Discrimination Against Women (CEDAW), Universal Declaration of Human Rights, United Nations Covenant on Civil and Political Rights, United Nations Covenant on Social and Cultural Rights etc?

z) Can the personal law of a religious community (assuming such law exists) run counter to the constitutional safeguards of equality, freedom, gender justice and a uniform civil code?

aa) Whether, the learned High Court has not failed to exercise its jurisdiction and authority by not issuing an order/direction as prayed for having categorically held that the Respondents did not produce any justification supportive of their stand in terms of any authority, religious text, law or precedent?

bb) Whether requiring that a fact finding inquiry be undertaken to confirm the religious identity of a woman after her marriage (under Section 13 of the Special Marriage Act, 1954) while requiring no such inquiry for a man after his marriage does not wholly defeat the purpose of the Special Marriage Act, 1954, Articles 14, 15, 21 and 26 of the Constitution of India?

cc) Whether the Constitution of India does not mandate that old, discriminatory, customs (assuming such customs actually existed) which have fallen foul of Constitutional provisions, especially those under Part III, be discarded to ensure secularism, equality, freedom and dignity of an individual?

dd) Whether an alleged religious custom / usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by courts in the country?

ee) Whether the learned High Court in its Impugned majority judgment did not fail to consider and hold that the

contesting Respondents having a limited fiduciary capacity towards the trust and its beneficiaries and required to act solely within and under the authority of the trust deed, which sets out the wishes and directions of its settlers, and the trust deed having not stipulated and ordained any such prescription to the effect that the Parsi woman marrying a non-Parsi man shall not be allowed entry into the Agiari and the Tower of Silence, did the trustees acted in excess of their lawful authority and power in seeking to deny the Petitioner and Parsi Zoroastrian, her natural, legal and fundamental religious right of religious faith and practices?

ff) Whether a writ petition under Article 226 cannot lie against a Trust which under the garb of being the custodian of a particular religion prohibits the entry of women to some religious institutions under its management and control on unconstitutional grounds thereby offending their rights as guaranteed by Articles 14, 15, 21 and 25 of the Constitution of India?

gg) Whether the Respondent, which admittedly provides facilities for disposal of the bodies of human beings, is performing a public function or an activity in the nature of a public function, and a writ petition filed under Article 226 of the Constitution is maintainable against the Respondent?

hh) Whether provision of a facility for disposal of the bodies of human beings is not a public function when the same is

prescribed in the Twelfth Schedule to the Constitution, read with Article 243W, as one of the functions of Municipalities provided for in Part IXA of the Constitution?

3. **DECLARATION IN TERMS OF RULE 4 (2):**

The Petitioner states that no other Petition seeking leave to Appeal has been filed by it against the Impugned Judgment.

4. **DECLARATION IN TERMS OF RULE 6:**

The Annexures P1 (Collectively) produced along with the Special Leave Petition are true copies of the pleadings / documents which form part of the record of the case in the said Special Civil Application filed in the court below against whose final Judgment and Order leave to appeal is sought for in the present Petition.

5. This Special Leave Petition is sought on the following:

GROUNDS:

A. BECAUSE the Impugned majority judgment committed a grave error in observing that *"a born Parsi woman by contracting a civil marriage with a non-Parsi under the Special Marriage Act, 1954, would be deemed and presumed to have acquired the religious status of her husband"*. The High Court failed to appreciate that post-independence, in tune with the constitutional philosophy of a secular state **The Special Marriage Act, 1954**, was enacted as a special legislation to provide for a special form of marriage by registration which does not require

either party to the marriage to renounce his / her religion.

B. BECAUSE, the Impugned Majority judgment has been passed in derogation of Article 25 of the Constitution of India which guarantees to all persons, including women and children, the right to "*freedom of conscience and the right to freely profess, practice and propagate religion*". The Impugned Judgment also strikes at the very root of the fundamental rights and freedoms guaranteed under Article 14, 15 and 21 of the Constitution of India. As per the Impugned Judgment, the religious status of a woman is *ipso facto* that of the religious status of her father, before her marriage, and that of her husband, after her marriage. As such therefore, as per the Impugned Judgment, the woman has no right whatsoever to "freely" profess, practice, and propagate her 'own' religion as per her own volition. The decision as to which religion she follows is made dependent, by the Impugned Judgment, upon the religion of her father (before her marriage) and that of her husband (after her marriage).

C. BECAUSE, the High Court erred by adopting a narrow and pedantic approach for interpreting the religious rights of women. The High Court's classification on the basis of gender is discriminatory, retrograde and impermissible as per the basic principles of our constitutional law.

D. BECAUSE, the High Court failed to appreciate that it was the Special Marriage Act of 1872 which did not have any

provision recognizing marriages between two persons belonging to different religions or solemnizing the marriage while still retaining their respective religious identity. However, the Special Marriage Act, 1954, was enacted as a more progressive legislation to replace the Act of 1872 so as to provide a special form of marriage which can be taken advantage of by any person in India and by all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess. In addition to a large number of progressive measures in the Act of 1954 with regard to marriage, divorce, maintenance, inheritance and legitimacy of children, this is one of the most basic, most essential and fundamental feature of the Act.

E. BECAUSE, in a major departure from the predecessor Act of 1872, the Special Marriage Act, 1954 made provision for solemnization of marriage between two persons belonging to any religion as long as they fulfill the conditions contained in Section 4 of the said Act. In fact, the said Section 4 starts with a non-obstante clause providing that notwithstanding anything contained in any law for the time being in force for the solemnization of marriages, a marriage between any two persons may be solemnized under the Special Marriage Act, 1954, if at the time of the marriage the conditions contained in the said section are fulfilled, viz. neither party has a spouse living, neither party is of unsound mind, the male has completed the age of 21 years and the female of 18 years etc. None of the conditions require that the man and the woman

must belong to the same religion. In fact, the provision has been made to enable two persons belonging to two different religions to solemnize the marriage without either of them renouncing his / her religion or converting into the religion of the to-be-spouse.

F. BECAUSE the High Court failed to appreciate that in a secular State and the constitutional philosophy that has been adopted in India, it would be impossible to imagine that two persons belonging to different religions would not be permitted to solemnize a valid marriage unless at least one of them is prepared to renounce his / her religion and accept conversion. Therefore, Section 4 of the Special Marriage Act, 1954, makes a special provision enabling such couples to solemnize the marriage while still retaining their respective religious identities and sentiments. This is in tune with the constitutional ethos which envisages a secular state with liberal society.

G. BECAUSE the High Court committed a grave error by introducing the erroneous concept of a *"deemed merger"* or *"deemed conversion"* of wife into the religion of her husband and failed to appreciate the numerous complications that such a concept would result in. The High Court ought to have appreciated that relinquishment of a religion and embracing another one is a matter of personal faith of an individual, ordinarily preceded by ceremonies prescribed under the respective religions and most important coupled with the intention of the

individual to relinquish one religion and embrace the other.

H. BECAUSE it is wholly incorrect to hold that a wife would acquire the religion of her husband or vice versa. To say that a wife acquires the religion of her husband would amount to denial of her fundamental right to "freely" profess and practice any religion as guaranteed under Article 25 of the Constitution. The High Court ought to have appreciated that in the absence of any voluntary conversion prior to or after marriage each person is entitled to continue in the same religion to which he / she belonged. A question as to the religion of their children would depend upon how the children are brought up and ultimately it would depend upon the volition of the children themselves after they attain the age of majority. This is the only interpretation which would also justify and support the well recognized practice of conversion of religion.

I. BECAUSE, the High Court ignored the fact that there may be many religions which do not recognize conversion. Assuming (whilst denying), for instance that, the Parsi Zoroastrian religion does not permit conversion; in such a case, if a Parsi Zoroastrian man were to marry a non-Parsi woman, what would her religious status be after her marriage if the High Court's principle of automatic deemed conversion into the religion of the husband (upon marriage under the Special Marriage Act, 1954) is accepted? A further anomaly is created by the Impugned

Judgment for women who go through a divorce. What would the religious status of a divorced woman be? Would it be that of her husband (whom she has divorced) or would it revert back to her pre-marriage status, i.e. religious status of her father? Assuming the woman remarries (after divorce) would she again undergo an automatic religious conversion?

J. BECAUSE the High Court failed to appreciate that quite apart from the complications that would arise upon such a regressive interpretation of the Special Marriage Act, 1954, such an interpretation is arbitrary, discriminatory and completely opposed to the right of a woman to live equally, freely and with dignity, as guaranteed by Article 14, 15, 21, and 25 of the Constitution of India. The High Court's skewed interpretation of the provisions of the Special Marriage Act, 1954, relegate women to the class of cattle, a menacing approach which this Hon'ble Court has warned against and abrogated. It has often been held that "*a woman is not the private property of her husband. The feudal concept that a woman loses her legal identity on marriage, and it merges in the identity of her husband, is no longer acceptable today.*"

K. BECAUSE, the High Court committed a grave error by failing to appreciate that the requirement that both parties to a marriage must necessarily be Parsi Zoroastrians, is a requirement for a marriage solemnized under the Parsi Marriage and Divorce Act, 1936, and not

for marriages solemnized under the Special Marriage Act, 1954.

L. BECAUSE, the High Court failed to appreciate the Petitioner's repeated laments that she was born as a Parsi to Parsi Zoroastrian parents and her Navjote ceremony was performed as per the tenets of the Zoroastrian religion and that she is a Parsi Zoroastrian. That she has always been and continues to be a Parsi Zoroastrian following the Zoroastrian religion even after her marriage to a Hindu. The High Court failed to appreciate that the Petitioner's certificate of marriage was issued under Section 13 of the Special Marriage Act, 1954 which is the provision pertaining to registration of marriages solemnized under the said Act. There is nothing on record to even suggest that while marrying her husband (a Hindu) the Petitioner converted herself to Hindu religion. The same is not even required for a marriage solemnized under the Special Marriage Act, 1954.

M. BECAUSE the High Court committed a grave error in unduly placing emphasis on the fact that the Petitioner had changed her name from 'Goolrokh' to a Hindu sounding name 'Neha'. The High Court failed to note that the Petitioner, of her own free will, changed her name to 'Neha' much before she got married. Such change of name cannot give rise to the presumption that the Petitioner relinquished her religion and embraced Hindu religion before or even after her marriage. As a matter of fact, Hindu/Christian names like Priyanka, Smita, Kamal,

Natasha, Daisy, Karan etc., are commonly found in Parsi Zoroastrians. This Hon'ble Court, in ***M. Chandra vs. M. Thangamuthu & Anr. (2010) 9 SCC 712,*** has *inter alia* observed *that "the determination of the religious acceptance of a person must not be made on his name or his birth".* This Hon'ble Court also noted in ***Ganpat vs. Returning Officer & Ors. (1975) 1 SCC 589*** that in Andhra Pradesh, *"Hindu saints have names like Mastan Ayya or Hussain Amma named after whose durgah are near their places".* Merely because they have Muslim names, would not mean that they have converted themselves into the Muslim religion.

N. BECAUSE, the High Court failed to appreciate and apply **the settled law as set forth in the landmark decisions rendered in *Sir Dinshaw Manekji Petit vs. Sir Jamsetji Jeejeebhoy 33 ILR (1909) Bom. 509* and *Saklat vs. Bella 1925(28) Bom LR 161,*** which were recently also applied by the Bombay High Court in ***Jamshed Kanga vs. Parsi Panchayat Funds & Properties & Ors.*** A conjoint reading of the said decisions makes the following position absolutely clear:

(i) Parsi Zoroastrians are:

(a) Firstly, the descendants of the original emigrants into India from Persia who profess the Zoroastrian religion;

(b) Secondly, the descendants of the Zoroastrians in Persia who were not amongst

the original emigrants, but who are of the same stock and have since that date, from time to time, come to India and have settled here, either permanently or temporarily, and who profess the Zoroastrian religion;

(c) Thirdly, the children of a Parsi father by an alien mother, if such children are admitted into the religion of their fathers and profess the Zoroastrian religion.

(ii) A person born to Parsi Zoroastrians parents is a Parsi and is entitled to enter and pray at the Fire Temple, Tower of Silence etc.

(iii) The Parsi Zoroastrian religion even permits conversion, however since their advent into India, Zoroastrians have never attempted to convert anyone into their religion, and

(iv) Trustees of religious trusts are not bound to exclude persons who may have no legal title to or in the Trust.

(v) The administration of a religious trust is a secular activity;

(vi) Trustees are to only perform secular duties and do not have any religious functions,

(vii) A right is recognized in absolute terms in every member of the Parsi community, who professes Zoroastrian religion, to be able to utilize the Towers of Silence as a place for exposure of the dead and for the purposes of religious rites and ceremonies,

(viii) The Trustees have not been conferred with the power to exclude , and no power of excommunication exists in the Zoroastrian faith.

O. BECAUSE after erroneously concluding that the Petitioner has ceased to be a Parsi by virtue of marrying a non-Parsi man, the High Court declined to grant any relief to the Petitioner, as sought for by her, by observing that the Petitioner had not claimed any rights as a non-Parsi Zoroastrian. By adopting such a narrow and pedantic approach, especially when the valuable constitutional rights of the Petitioner were involved, the High Court has committed a grave error. Interestingly, the High Court proceeded to note that:

> *"... no material was brought our notice by any authenticated religious tenants prohibiting entry by non-Parsi may be male or may be female... Nothing is brought to our notice in which it is stated that non-Parsi Zoroastrian is prohibited to enter Agiyari... we are not shown any material as to how entry of a non-Parsi to Agiyari for offering the prayer would violate the integral part of Zoroastrian religion..."*

Despite making these observations the High Court declined to provide any relief to the Petitioner as requested for by her. It is respectfully stated that there is

nothing in the Parsi Zoroastrian religion or tenet which (a) prohibits inter-religion marriages; or which (b) ordains that a woman or man marrying outside the Parsi Zoroastrian community ceases be a Parsi Zoroastrian or is prohibited from participating in Parsi Zoroastrian religious customs / practices. In fact, the Parsi Zoroastrian religion even permits conversion.

P. BECAUSE, the High Court erred in holding that a woman shall have to prove that she has continued to follow her own religion after marriage and has not adopted that of her husband by way of a declaration in this behalf from a competent court which will conduct a full fledged fact-finding inquiry for the same. Asking women to go through such a tedious and rigorous process of proving their religious identity only because they have married a man from a different religion is wholly arbitrary, unjust and pernicious. It is curious that the High Court did not consider it necessary to ask men to go through this process. Such requirements from women as opposed to men, only reinforces the worrisome reality that the age old discrimination of women on the basis of gender still exists in India. This is a grave dereliction of the principles of equality before law, equal protection, gender equality and uniform civil code enshrined in our Constitution.

Q. BECAUSE , the views of the High Court with respect to the rights and position of women versus men run counter to the observations made by this Hon'ble Court in ***Githa***

Hariharan vs. Reserve Bank of India, AIR 1999 SC 1149, where it was held that:

> *"Gender equality is one of the basic principles of our Constitution... Nothing should run counter to the basic requirement of the constitutional mandate, especially, which would lead to a differentiation between a male and a female. Normal rules of interpretation shall have to bow down to the requirement of the Constitution since the Constitution is supreme... the father by reason of his dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship..."*

R. BECAUSE the High Court committed a grave error in observing that *"if a man is married with a woman following a different religion, in normal circumstances, it should be deemed that the woman has acquired the religion of her husband after marriage".* The High Court committed a further error by observing that *"it is only then that the children born out of the wedlock will also be identified in the society as following a religion which was being followed by their father prior to the marriage".* In the opinion of the High Court, *"it should be presumed and considered that the woman after marriage has merged into the religion of her husband and such will be the identity of their family originating from their marriage in comparison to the society at large".*

S. BECAUSE, such forced imposition of a religious faith on women and children runs counter to their rights to freely profess, practice and profess the religion of their choice – a guarantee under Article 25 of the Constitution of India as well as requirement under International conventions such as Convention on Elimination of All forms of

Discrimination Against Women **(CEDAW)**, Convention on the Rights of the Child, and Universal Declaration of Human Rights which have been signed and ratified by India.

T. BECAUSE by holding that - women should be deemed to have merged into the religion of their husbands upon their marriage and by virtue thereof the children born out of the wedlock should be recognized as following the religion of their father – the High Court has pre-decided the religious status of women as well as children irrespective of their will, desire, volition or choice in this behalf. As early as in 1954, this Hon'ble Court, while discussing the meaning and purport of Article 25 of the Constitution, in ***Ratilal Panachand Gandhi vs. State of Bombay, AIR 1954 SC 388***, held that *"Freedom of conscience connotes a person's right to entertain beliefs and doctrines concerning matters which are regarded by him to be conducive to his spiritual well being"*. It was further observed, in ***Punjab Rao vs. D.P. Meshram AIR 1965 SC 1179***, that *"the right is not only to entertain such religious beliefs as may be approved by his judgment or conscience but also to exhibit his sentiment in overt acts as are enjoined by his religion"*. In the words of Article 25, a person may "profess, practice and propagate" his / her religion. To profess one's religion means the right to declare freely and openly one's faith.

U. BECAUSE the High Court ignored the well-established and recognized observations of this Hon'ble Court in ***Lily***

Thomas & Ors. vs. Union of India & Ors. (2000) 6 SCC 224 wherein it was stated that:

> *"Religion is a matter of faith stemming from the depth of the heard and mind. Religion is a belief which binds the spiritual nature of man to super natural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable...."*

V. BECAUSE the High Court failed to appreciate that in allowing a male Parsi, married to a non-Parsi from enjoying all the rights and privileges of the Parsi Zoroastrian religion whilst denying such rights to Parsi Zoroastrian women married to non-Parsi men, the Respondent Trust is arbitrarily discriminating against women. The High Court committed a grave error in upholding the Respondent Trustees' discriminatory and pernicious practice of prohibiting the Petitioner and other Parsi Zoroastrian women, who are married to non-Parsis from entering the Agiyari (Fire Temple), Tower of Silence and / or from permitting them to participate in Parsi religious ceremonies while extending this benefit to Parsi males married to non-Parsi females. The High Court permitted such discrimination despite admitting that nothing was brought to the Court's attention which would show how entry even of a non-Parsi to an Agiyari for offering prayers would violate the integral part of Parsi Zoroastrian religion.

W. BECAUSE, the High Court failed to appreciate that equality of gender is a cardinal human right, which is

universally accepted. Equality between the sexes is included in the equality "in dignity and rights" of all human beings declared by Article 1 of the Universal Declaration of Human Rights. Article 2 of the Declaration specifically states that all persons, without any distinction of sex, are entitled to the human rights set forth therein. Apart from this Article 16 of the Declaration stipulates the equal marital and family rights of men and women. Equality of, and the absence of discrimination between the sexes is similarly emphasized by the United Nations (UN) Covenant on Civil and Political Rights (Articles 2.1, 3, 4.1, 23, 24.1, 26) and the UN Covenant on Social and Cultural Rights (Articles 3, 7(a)). Equality of treatment of men and women is also enshrined in the Constitution of India (Articles 14 and 15) and is an integral part of public policy. Any discrimination, as in the case of the Petitioner, is repugnant to the Constitution of India, contrary to public policy and opposed to several declarations of basic human rights.

X. BECAUSE, the High Court failed to appreciate that the Zoroastrian faith / religion has never recognized and / or never had a tradition of a recognized body of ecclesiastical law or law-givers, nor is there a tradition of interpretation by "High Priests". Practices of religious observances have been fluid and are followed due to broad acceptability among the laity without any formal prescription. These observances are evolving as time passes and different Parsi Anjumans have strikingly different practices within India and abroad.

Y. BECAUSE the High Court failed to note that there is nothing in the Zoroastrian religion which prevents either a Parsi Zoroastrian man or woman from marrying a non-Parsi spouse, and there is nothing which deprives the said person from the right to continue to follow Zoroastrian religion and exercise all the privileges and rights as followers who practice the Zoroastrian religion.

Z. BECAUSE the High Court failed to appreciate that as a Parsi Zoroastrian woman, the Petitioner has a right under Article 25 of the Constitution to follow her Zoroastrian religion and enjoy all privileges and rights which are available to Parsi Zoroastrians, eg. Wedding and Navjote at public places, Jashan, Baj, Nirangdin, Vandidad, Ferashta, Muktad, including the privilege and right of praying at an Agiyari, the Tower of Silence and participating in Parsi Zoroastrian religious ceremonies. The High Court failed to appreciate that there is nothing in the Parsi Zoroastrian religion, scripture, or text books, denying to the Petitioner or any other Parsi woman, married to a non-Parsi man, any of the aforesaid rights.

AA. BECAUSE, the High Court permitted itself to be hoodwinked by the Respondents and failed to apply its mind to the relevant material that was placed before it. It is pertinent to note in this behalf that purportedly in support of their case the Respondents had furnished the Affidavits of the following three High Priests of the Parsi community, viz. (i) Dastur Firoze M. Kotwal, (ii) Dastur

Dr. Kaikhusroo Minocher Jamaspasa and (ii) Dastur Dr. Peshotan Hormazdyar Mirza. The Affidavits filed by the said High Priests are almost identical and stipulate that Parsi Zoroastrian women married to non-Parsi men are disallowed from visiting and praying at the Fire Temple and / or attend religious ceremonies / functions at the Tower of Silence or otherwise. That their names cannot be recited in any Parsi religious prayers etc.

The High Court failed to notice that two of these very High Priests were in fact present and discussed their views on the subject in the Office of the Bombay Parsi Panchayat Funds and Properties, Bombay, in the course of considering the case of **Ms. Roxan Darshan Shah in the year 1991.** The contents of the Resolution passed by the said Bombay Parsi Panchayat on May 14, 1991 are very relevant to the present case and the same are therefore being extracted here for the sake of convenience:

> *"That the Board once again discussed at great length this matter and considered various views expressed by the cross section of the parsi society including:*
>
> ***a)*** *The three Head* ***priests Dusturji Dr. Hormazdyar Mirza, Dusturji Dr. Kaikhushroo M Jamasp and Durjurji Dr. Firoze Kotwal."***
>
> *The Trustees taking into consideration the following Viz, that –*
>
> *(a)* *"In none of the opinions expressed by the Priests and Parsi scholars they have referred to any authoritative pronouncement from the relevant texts to the effect that on such inter-communal marriage the Parsi female would automatically renounce the faith. In fact, some of the Priests and Scholars including Dasturji Khurshed Dabu and Prof.*

Kaikhusrov D. Irani have expressed a contrary view.

(b) The Funds and Institutions under the management and control of the Trustees were founded only for the members of the Parsi community which include inter alia the children of Parsi fathers by alien mothers, who have been duly and properly admitted into the religion as held in Sir Dinshaw M. Petit vs. Sir Jamsetji Jeejeebhoy (1909) 11 Bom LR 85 and the Parsi ladies who marry outside the Zoroastrian faith do fulfill this test.

(c) There is no express provision anywhere in the relevant Trust Deeds to the effect that such ladies who have married outside the community and who continue to follow the Zoroastrian faith would be debarred from availing of the Trust facilities. True, the intention of the founders of the Trust was to extend the benefits to only those who are born into the community and born of a Zoroastrian father and such ladies are born into the community and are of Zoroastrian fathers.

*** *** *** ***

(e) The predecessor Trustees in the earlier part of the 18th Century had admitted into the Parsi fold, children of Parsi fathers by alien mothers as per the aforesaid judgment in the case of Sir Dinshaw M. Petit vs. Sir Jamsetji Jeejeebhoy.

(f) As held in the aforesaid case of Sir Dinshaw M. Petit vs. Sir Jamsetji Jeejeebhoy, a custom that has been built up by passage of time has the effect of overriding a tenet of religion.

(g) Subsequent to the judgment in Petit vs. Jeejeebhoy (1909), for a long period of more than 80 years the children of Parsi fathers by alien mothers have been admitted into the fold, thereby setting at naught the tenet of the religion that on marriage to an alien, a Parsi Zoroastrian renounces the faith, assuming that there is such a tenet.

*** *** *** ***

(i) To hold at this stage that a Parsi girl who has married outside the community would not be entitled to the Doongerwadi facilities would also tantamount to the Trustees denying the

facilities... to them which would seem untenable apart from setting the clock back.

(j) As per the High Court decision in the case of Roshan Chagla & Ors. vs. The Trustees of the Parsi Panchayat, Parsi ladies married to non-Parsi gentlemen, and who continued to practice the Zoroastrian faith have been enrolled on the Electoral Register on the basis that they continue to remain Parsi Zoroastrian.

(k) There is great force in the contention that the denial of the facilities to such ladies married outside the community would result in breach of trust on the part of the Trustees.

(l) **Two of the High Priests of our community Dasturji Dr. Hormazdyar K. Mirza and Dasturji Dr. Kaikhusroo M. Jamaspasa have also observed...** that even under the Constitution of India the community has every right to practice our religious traditions and customs, and the custom has now been pointed out above.

(m) In the event of a litigation which is likely, it would be difficult in view of the aforesaid, to deny such ladies the facilities available to the members of the Zoroastrian community.

IT BE AND IS HEREBY RESOLVED by a majority (Mr. Homi P. Ranina and Dr. (Miss.) Mehroo D. Bengalee dissenting) –

(a) **That any Zoroastrian female who marries outside the Zoroastrian faith under the Special Marriage Act, 1954, or any other legislature which permits the parties to retain their religion prior to such marriage and who continue to follow the Zoroastrian faith be permitted to use of Doongerwaadi facilities on her death...."**

BB. BECAUSE the High Court failed to appreciate that the said three High Priests of the Parsi Zoroastrian community deliberately ignored to mention the proceedings and practices being followed by the Office of the Parsi Panchayat Funds and Properties, Bombay which they had

specifically agreed to with the obvious intention of misleading the High Court.

CC. BECAUSE, the High Court failed to appreciate that different views exist in the Parsi Zoroastrian community regarding practices to be followed. Interestingly, in the view of Dastur Khurshed Kaikobad Dastoor, the High Priest of Iranshah, Udwada the Parsi Zoroastrian religion is based on gender equality and if a Parsi / Irani girl or boy chooses to marry outside the faith and does do by way of a civil ceremony, he / she has every right continue to attend the Agiyari or Atashbehram of their choosing.

DD. BECAUSE, while considering the rights of the Respondent Trust under Article 26 of the Constitution of India, the High Court failed to note that different Parsi religious denominations across the country apply / follow different rules of conduct for Parsi women married to non-Parsi men. There is no uniformity in the application of these rules. This is because there is no custom / usage, whatsoever, in the Parsi religion which ordains that Parsi women married to non-Parsi men are debarred from following their Parsi Zoroastrian religion or participating in Parsi religious ceremonies or entering an Agiyari or Tower of Silence.

EE. BECAUSE, the High Court failed to take into account the relevant material furnished by the Petitioner to show that different Parsi denominations spread across the world (including India) are applying different rules of conduct on

Parsi women married to non-Parsi men. While the Agiyaris / Trusts situated in Pardi, Delhi, Kanpur, Madras, Jabalpur, Allahabad, Daman, Chikhli, Jamshedpur, Kolkata, Vadodara, London, Ontario (Canada), Florida and Chicago (USA) - do not prohibit Parsi Zoroastrian women married to non-Parsi men from entering or offering prayers at the Parsi Agiyari or participating in Parsi religious functions and ceremonies, the present Respondent Trustees are adopting an opposite, discriminatory and retrograde practice in Valsad, which must not be countenanced.

FF. BECAUSE, the High Court committed a grave error in ignoring that the rights guaranteed under Article 26 are to be enjoyed by any religious denomination but it has to give equal treatment to every person professing and practicing a particular religion. Any action by the religious denomination curtailing such right of equality amongst the person professing and practicing a particular religion is violative of rights guaranteed under Article 25. The High Court ignored that different Parsi Agiyaris / Trusts across the world were following different practices in the context of Parsi women married to non-Parsi men. It was thus clear to the High Court that the Parsi community as a whole did not regard regulating the entry or participation of Parsi women (married to a non-Parsi) in the Fire Temple or religious ceremonies as an essential part of religion and/or custom.

GG. BECAUSE, the High Court failed to take into account that in the past, the same Respondent Trust, under the management of different office bearers, permitted Parsi Zoroastrian women married to non-Parsi men from entering and / or offering prayers at the Agiyari in Valsad or participating in Parsi religious functions and ceremonies. This was clearly borne out from the Affidavit dated March 29, 2010 filed by Ms. Dilbar Valvi in support of the petition as well as the Affidavit dated March 31, 2010 of Ms. Zarin Jehanbux Chavada and Affidavit dated 23rd June 2010 of Binaifer Kantawala – both Parsi Zoroastrian women from Valsad.

HH. BECAUSE, the High Court failed to note that there was no custom or usage in the Parsi Zoroastrian religion which ordains that Parsi women married to non-Parsi men are debarred from following their Parsi Zoroastrian religion or participating in Parsi religious ceremonies or entering an Agiyari or Tower of Silence. In fact, gender based discrimination or recognition of gender based inequality for participation in religious functions has never been recognized in the Zoroastrian faith, more particularly as practiced in India.

II. BECAUSE, in the course of considering the views and practices of "liberal" as well as "conservative" Parsi Zoroastrians, the High Court ought to have appreciated that whatever one's own predilections may be, no one can be above the law of the land as set forth in the Constitution of India.

JJ. BECAUSE, the High Court committed a grave error in proceeding on the basis as if such custom / usage exists in the Parsi Zoroastrian religion, without, admittedly, there being an iota of material in support to contend that Parsi Zoroastrian women married to non-Parsi men are debarred from following their Parsi Zoroastrian religion or participating in Parsi religious ceremonies or entering an Agiyari or Tower of Silence. Even assuming (whilst denying) that any such custom at all existed, the High Court, in exercise of its power under Article 226 of the Constitution of India, ought to have discarded such custom / usage inasmuch as the same has fallen foul to the constitutional provisions; in particular those contained in Chapter III, viz. fundamental rights. In omitting to do so, the High Court has erred and ignored ignoring the observations made by this Hon'ble Court in:

N. Adithayan vs. Travancore Devaswom Board & Ors. (2002) 8 SCC 106:

> *"Any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by Courts in the country."*

KK. BECAUSE, the High Court failed to appreciate that protection under Article 26 is to religious practice which forms an essential and integral part of the religion. It is settled law that while a practice may be a religious

practice but it may not be an essential and integral part of that religion. The High Court did not come to a finding on this issue at all. It admitted that it did not have enough material to come to a finding whether prohibiting Parsi Zoroastrian women married to a non-Parsi man from partaking in Parsi religious ceremonies and practices was an essential practice of the Zoroastrian religion. Yet it dismissed the petition of the Petitioner raiding her of her rights under Article 25 of the Constitution without their being any reason, let alone any basis, for permitting Article 26 to trump over the guarantee of Article 25.

The High Court failed to appreciate that Article 25 (freedom of conscience) and Article 26 (freedom to manage religious affairs) of the Constitution are not stand alone rights but are subject to restrictions by the State on grounds of public order, morality and health. [*Acharya Jagdishwaranand Avadhuta and ors, vs. Commissioner of Police, Calcutta and Anr. AIR 1981 SC 51*]. Article 25 itself permits legislation in the interest of social welfare and reform. [*Javed and Ors. vs. State of Haryana and Ors. vs. State of Haryana and Ors. AIR 2003 SC 3057*]. The Supreme Court held that right under Article 25 of the Constitution is placed only subject to the other fundamental rights enumerated in Part III of the Constitution.

LL. BECAUSE the High Court failed to appreciate that any custom or usage in the personal law of a community, even assuming that such law at all exists (which in this case it does not), cannot run counter to the constitutional

safeguards of gender justice and as such cannot but be termed to be void and *ultra vires* the Constitution. In interpreting any such custom or usage, the Courts have to be alive and sensitive to the realities of existing times. This Hon'ble Court has often instructed that the Constitution of India must be construed in a manner that it lives and adapts to the evolving society and changing times. In this regard, reference to this Hon'ble Court's views in the following cases is relevant:

> ***M/s. Video Electronics Pvt. Ltd. & Anr. vs. State of Punjab & Ors. AIR 1990 SC 820:***
>
> *Constitution of India is an organic document. It must be so construed that it lives and adapts itself to the exigencies of the situation, in a growing and evolving society, economically, politically and socially....*
>
> ***Ashoka Kumar Thakur vs. Union of India, AIR 2008 SC (Supp) 1:***
>
> *The Constitution of India is not intended to be static. It is by its very nature dynamic. It is a living and organic thing. The Constitution reflects the belief and political aspirations of those who had framed it.*

MM. BECAUSE, the High Court failed to appreciate that the Respondent Trustees are members of a Trust which was set up to perform the secular function of managing and controlling the Trust's properties, which included *inter alia* the Tower of Silence. As such therefore, the Trustees are merely custodians of the said properties. This Hon'ble Court has held that the administration of a religious trust is a secular activity (***Raja Bira Kishore Deb vs. The State of Orissa AIR 1964 SC 1501; Pannalal Bansilal Pitti vs. State of Andhra Pradesh (1996) 2 SCC 498*** and ***A.S. Narayana Deekshitulu vs. State of Andhra***

Pradesh (1996) 9 SCC 548). As such therefore, the High Court ought to have appreciated that the Respondent Trusteese only have secular duties but no religious functions. The Trustees do not have any right whatsoever to exclude any Parsi Zoroastrian from entering the Tower of Silence or the Fire Temple or from participating in Parsi Zoroastrian religious ceremonies.

NN. BECAUSE, the Impugned Judgment has been passed in utter disregard of the well-entrenched constitutional principles, which have often been underscored by this Hon'ble Court. **In *Valsamma Paul vs. Cochin University & Ors. (1996) 3 SCC 545,*** this Hon'ble Court observed:

> *"... The Constitution seeks to establish a secular, socialist, democratic Republic in which every citizen has equality of status and of opportunity, to promote among the people dignity of the individual, unity and integrity of the nation transcending them from caste, sectional, religious barriers fostering fraternity among them in an integrated Bharat.. With the advancement of human rights and constitutional philosophy of social and economic democracy in a democratic polity to all the citizens on equal footing, secularism has been held to be one of the basic features of the Constitution (Vide: S.R. Bommai vs. Union of India (1994) 3 SCC 1) and egalitarian social order is its foundation.*
>
> *The Constitution, through its Preamble, Fundamental Rights and Directive Principles created secular State based on the principle of equality and non-discrimination striking a balance between the rights of the individuals and the duty and commitment of the State to establish an egalitarian social order."*

OO. BECAUSE, the High Court failed to appreciate that any practice which prevents a person from performing the last rites of her parents or prevents even her presence when

such rights are being performed, would be opposed to basic human rights and the right to live with dignity and freedom. In the similar vein, preventing a person from being cremated upon death as per his / her religious rites would be opposed to fundamental right to profess any religion, the right to live and die with dignity.

PP. BECAUSE the High Court failed to apply the law correctly in holding that a writ petition would not lie against the Respondent Trust. This Hon'ble Court has often held that in cases involving the breach of fundamental rights, even the existence of an alternative remedy is no ground for the refusal of proper relief (***U.P. State vs. Mohd. Nooh AIR 1959 SC 86; Kharak Singh vs. State of UP AIR 1963 SC 1295***). It is settled law that a writ under Article 226 also lies against a "person" for the enforcement of any of the rights conferred by Part III of the Constitution.

QQ. BECAUSE, the High Court failed to appreciate that the constitutional right under Article 25(1) is a stand-alone right, and the provisions of Article 25(2) does not indicate that the said right is addressed only to the State. On the contrary, the opening words of Article 25(2), viz. "Nothing in this Article..." presuppose that the provisions of Article 25(1) are meant to be observed by all, including individuals, trusts and their trustees. The word "freely" in the phrase "the right to freely profess, practice and propagate religion" in Article 25 lends support to this interpretation because "freely" means "without let or hindrance".

RR. BECAUSE the High Court ignored the Petitioner's submissions that the Petitioner had no other alternative or efficacious remedy but to seek the issuance of a writ against the Respondent Trust. The Petitioner clearly stated in her petition that "the only authority exercising any kind of oversight over the Respondent if the Office of the Charity Commissioner of Gujarat acting under the Bombay Trusts Act, 1954. However, the said authority has refused to interfere in matters of civil religious rights of offering worship and disposal of the dead on the ground that it is a 'religious issue'. As such therefore, the Petitioner had no choice but to approach the High Court with a writ petition under Article 226 of the Constitution of India.

SS. BECAUSE Hon'ble High Court erred in holding that the Petitioners writ is not maintainable against the Respondent – being a private Trust. It is submitted that Indian jurisprudence has extended the principle of fairness to those who discharge public functions. Even the notion of public functions has been significantly expanded in recent times, in that, a body is held to be performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. A private body performing a 'public function' is held to the constitutional standards regarding civil rights and equal protection of the laws that apply to the State itself. The administration of the Tower

of Silence though privately carried on, was, nevertheless, in the nature of a 'public function', that the private rights of the Trust must therefore be exercised within constitutional limitations.

TT. BECAUSE the Hon'ble High Court failed to appreciate that the Respondent, which admittedly provides facilities for disposal of the bodies of human beings, is performing a public function or an activity in the nature of a public function, and a writ petition filed under Article 226 of the Constitution is thus maintainable against the Respondent. A facility for disposal of the bodies of human beings, it is submitted, is a public function when the same is prescribed in the Twelfth Schedule to the Constitution, read with Article 243W, as one of the functions of Municipalities provided for in Part IXA of the Constitution.

UU. BECAUSE the High Court erred in observing that a writ could not be issued against the Respondent Trust. The High Court failed to appreciate that the Respondent Trust, a self-proclaimed 'custodian of religion' was interfering with the Petitioner's fundamental right to practice and profess her religion, her right to life, dignity and equality. In these circumstances it was in fact incumbent upon the High Court, in exercise of the wide, discretionary powers conferred by Article 226, to restrain the Respondents from practicing religious obscurantism and discrimination.

6. **GROUNDS FOR INTERIM RELIEFS:**

A. The Petitioner states her parents are around 80 years old and while the Petitioner would hope and pray that they live long and healthy lives, life is not certain. In the unfortunate event of the demise of either of the Petitioner's parents, the Petitioner would want to attend to their funeral, participate in and perform their last rites as per theirs as well as her Parsi Zoroastrian religion. The Petitioner's parents reside in Valsad, there the Respondent Trust is located which manages and controls the Parsi Agiyari (Fire Temple) and Dungerwadi (Tower of Silence) where the funeral will most likely take place. Unless the operation of the Impugned Judgment is stayed and a direction is not passed specifically directing the Respondent Trustees to permit the Petitioner to enter the said places of worship (as may be required) for conducting the last rites and participating in ceremonies, the Respondent Trustees may perpetuate their illegal and pernicious tirade in the name of religion which will cause irreparable loss and injury to the petitioner and offend her rights of freedom to practice her Parsi Zorastrian religion, live with dignity and equality.

B. The Impugned judgment is bad in law as it is *prima facie* offends the well established constitutional law and principles of equality, dignity, religious freedom and right to live a meaningful life. If the Impugned Judgment is allowed to exist / operate, it will render these express constitutional mandates redundant / meaningless/ otiose.

7. **MAIN PRAYER:**

It is therefore most respectfully prayed that your Lordships may graciously be pleased to –

(a) grant special leave to appeal against the Impugned Judgment and Order dated March 23, 2012 passed by the Hon'ble High Court of Gujarat in Special Civil Application No. 449 of 2010; and

(b) pass such further order /orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case in the interest of justice and equity.

8. **INTERIM RELIEFS:**

It is therefore most respectfully prayed that pending disposal of this Petition, your Lordships may graciously be pleased to:

(a) grant an ad interim ex parte stay of the operation of the Impugned Judgment dated March 23, 2012 of the Hon'ble High Court of Gujarat in Special Civil Application No. 449 of 2010;

(b) require the Respondent Trustees to allow the Petitioner and not to prevent her from attending and/ or participating at the funeral ceremonies / prayers of her parents at the Tower of Silence Valsad and/or from entering into and / or worshipping at the Agiari or Fire Temple situated at Mota Parsiwad, Agiari Street, Valsad – 396 001; and

(c) pass such further order /orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case in the interest of justice and equity.

AND FOR THIS ACT OF KINDNESS THE PETITIONERS AS IN DUTY BOUND SHALL EVER PRAY.

Drawn & Filed by:

SHIRAZ CONTRACTOR PATODIA
Advocate for the Petitioner

Drawn on: 20th June, 2012

Filed on: 25th June, 2012